UNITED STATES REPORTS

VOLUME 545

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2004

JUNE 6 THROUGH OCTOBER 3, 2005

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 2008

Printed on Uncoated Permanent Printing Paper

For sale by the U. S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, CHIEF JUSTICE.[1]
JOHN G. ROBERTS, JR., CHIEF JUSTICE.[2]
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

ALBERTO R. GONZALES, ATTORNEY GENERAL.
PAUL D. CLEMENT, SOLICITOR GENERAL.[3]
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.

---

*For notes, see p. IV.

NOTES

[1] CHIEF JUSTICE REHNQUIST died in Arlington, Virginia, on September 3, 2005. Services were held at St. Matthew's Cathedral in Washington, D. C., on September 7, 2005, and interment was in Arlington National Cemetery on the same date. See *post*, p. XI.

[2] The Honorable John G. Roberts, Jr., of Maryland, formerly a judge of the United States Court of Appeals for the District of Columbia Circuit, was nominated by President Bush to be an Associate Justice of this Court on July 19, 2005, and to be Chief Justice of the United States on September 5, 2005; the nomination to be Chief Justice was confirmed by the Senate on September 29, 2005; he was commissioned and took the oaths of office and his seat on the same date. He was presented to the Court on October 3, 2005. See *post*, p. VII.

[3] The Honorable Paul D. Clement, of Virginia, was nominated by President Bush on March 11, 2005, to be Solicitor General; the nomination was confirmed by the Senate on June 9, 2005; he was commissioned and took the oath of office on June 13, 2005.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

(For next previous allotment, and modification, see 509 U. S., p. VI, and 512 U. S., p. V.)

(For next subsequent allotment, see *post*, p. VI.)

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 7, 2005, viz.:

For the District of Columbia Circuit, RUTH BADER GINSBURG, Associate Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, CLARENCE THOMAS, Associate Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, STEPHEN BREYER, Associate Justice.

September 7, 2005.

(For next previous allotment, see 512 U. S., p. VI.)

APPOINTMENT OF CHIEF JUSTICE ROBERTS

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 3, 2005

Present: JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER. .

The Marshal said:

All Rise, the President of the United States.

JUSTICE STEVENS said:

On behalf of the Court, Mr. President, I extend to you a warm welcome. This special sitting of the Court is held today to receive the Commission of the newly appointed Chief Justice of the United States, John G. Roberts, Jr. The Court will now recognize the Attorney General of the United States, Alberto Gonzales.

Attorney General Gonzales said:

JUSTICE STEVENS, and may it please the Court. I have the Commission which has been issued to the Honorable John G. Roberts, Jr., as Chief Justice of the United States. The Commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the Commission and that it be made part of the permanent records of this Court.

JUSTICE STEVENS said:

Thank you, General Gonzales, your motion is granted. Mr. Clerk, will you please read the Commission?

The Clerk read the Commission:

GEORGE W. BUSH,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of John G. Roberts, Jr., of Maryland, I have nominated, and, by and with the advice and consent of the Senate, do appoint him Chief Justice of the United States, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said John G. Roberts, Jr., during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this twenty-ninth day of September, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and thirtieth.

[SEAL] GEORGE W. BUSH

By the President:

ALBERTO GONZALES,
Attorney General

JUSTICE STEVENS said:

I now ask the Deputy Clerk of the Court to escort Judge Roberts to the bench.

JUSTICE STEVENS said:

Are you ready to take the oath?

Judge Roberts said:

I am.

JUSTICE STEVENS said:

Will you repeat after me?

Judge Roberts said:

I, John G. Roberts, Jr., do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as the Chief Justice of the United States under the Constitution and laws of the United States. So help me God.

JOHN G. ROBERTS, JR.

Subscribed and sworn to before me this third day of October, 2005.

JOHN PAUL STEVENS
Associate Justice

JUSTICE STEVENS said:

CHIEF JUSTICE ROBERTS, on behalf of all the members of the Court, it is a pleasure to extend to you a very warm welcome as the 17th Chief Justice of the United States and to wish you a long and happy career in our common calling.

DEATH OF CHIEF JUSTICE REHNQUIST

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 3, 2005

Present: CHIEF JUSTICE ROBERTS, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

JUSTICE STEVENS said:

For 30 days our flags have flown at half-mast as a gesture of respect for our friend and colleague, William Hubbs Rehnquist, the former Chief Justice of the United States, who died on September 3, 2005, at his home in Arlington, Virginia.

Born in Milwaukee in 1924, Bill Rehnquist was the son of William Benjamin and Margery Peck Rehnquist. He attended public elementary and high schools in Shorewood, Wisconsin, a suburb of Milwaukee. During the Second World War he served in the Army Air Force as a weather observer in the United States and North Africa. He was honorably discharged in April of 1946.

He was graduated Phi Beta Kappa from Stanford University with a B.A. and M.A. in 1948 and also received an M.A. from Harvard University in 1950. He earned his law degree from Stanford University in 1952, where he was first in his class.

After leaving Stanford, the Chief Justice was a law clerk to Supreme Court Justice Robert H. Jackson from February 1952 through June 1953. He practiced law in Phoenix, Arizona, from 1953 to 1969 when President Nixon appointed him Assistant Attorney General, Office of Legal Counsel. He

was nominated as an Associate Justice of the Supreme Court of the United States by President Nixon on October 21, 1971, and sworn in on January 7, 1972. Some 14 years later President Reagan nominated him Chief Justice of the United States and he was sworn in on September 26, 1986. Chief Justice Rehnquist was the longest serving Chief Justice since Chief Justice Melville Fuller, who died in office in 1910.

While on the bench, Chief Justice Rehnquist authored 458 opinions for the Court, 376 dissenting opinions, and over 100 separate writings either concurring in part and dissenting in part or explaining his rulings as a circuit justice. These opinions were lucid expositions of the law, often revealing his exceptional familiarity with the history of our country. Moreover many of them, as well as the books that he authored, provided evidence of his profound love for our country and our independent judicial system. He was truly the first among equals, having led us by examples of excellence rather than by fiat. Although his opinions have shaped every important area of the Court's jurisprudence, with his background as a practicing lawyer he realized that it was often the opinions issued with little fanfare that would have the greatest impact on the day-to-day practice of law. He sometimes described these opinions by quoting from Thomas Gray's *Elegy Written in a Country Churchyard:* "Full many a flower is born to blush unseen, And waste its sweetness on the desert air."

The members of this Court will greatly miss Chief Justice Rehnquist's warmth and collegiality. I speak for all of us in expressing our sympathy to his son, Jim, his daughters, Janet and Nancy, his grandchildren, and to all those whose lives were touched by this remarkable man. At an appropriate time, the traditional memorial observance of the Court and the Bar of the Court will be held in this Courtroom.

We now turn to the future. Tomorrow our flags will no longer fly at half-mast. Today we welcome our new CHIEF JUSTICE, JOHN G. ROBERTS, JR., and we express our thanks to President Bush and to the members of the United States

Senate for the wisdom and diligence that attended the process of nominating and confirming CHIEF JUSTICE ROBERTS in time to enable him to preside over our proceedings today. It is appropriate to note that in his pre-judicial career our new CHIEF JUSTICE argued 39 times before this Court, a number that exceeds the combined experience of the rest of us. We know him well, and he has already earned our respect and admiration.

THE CHIEF JUSTICE said:

Thank you very much, JUSTICE STEVENS.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2000 edition.

Cases reported before page 1101 are those decided with opinions of the Court. Cases reported on page 1101 *et seq.* are those in which orders were entered.

	Page
Abdullah *v.* Hedrick	1147
Abdur'Rahman; Bell *v.*	1151
Absalon, *In re*	1162
Abu Laila *v.* United States	1116
Adams, *In re*	1103
Adams; Quintana *v.*	1130
Adams County/Ohio Valley School Bd. *v.* Baker	1152
Adkins *v.* Kasper	1104
Adkins *v.* United States	1148
Adler; Harley *v.*	1154
Aguayo *v.* United States	1148,1162
Aguilar *v.* Patel	1108,1162
Agyeman; Gerber *v.*	1128
Ahlborn; Arkansas Dept. of Health and Human Services *v.*	1165
Ahmed *v.* Ohio	1124
Akerlind; Smith *v.*	1131,1159
Alabama; Clark *v.*	1130
Alabama; English *v.*	1127
Alabama; Pace *v.*	1108
Alabama; Peoples *v.*	1164
Alabama; Sibley *v.*	1156
Alabama Dept. of Corrections; Givens *v.*	1104
Alaska *v.* United States	75
Alcan Aluminum Corp. *v.* Bullard	1105
Alexander; Segura *v.*	1107
Alexis *v.* United States	1112
Al-Hafeez; Allah *v.*	1108
Al-Hakim, *In re*	1113
Ali *v.* Housing Authority of Paterson	1131
Allah *v.* Al-Hafeez	1108

Page
Allapattah Services, Inc.; Exxon Mobil Corp. *v.* 546
All Direct Travel Services, Inc. *v.* Delta Air Lines, Inc. 1104
Allen *v.* California 1125
Allen *v.* Crosby 1155
Allen *v.* Maxwell-Hodges 1156
Allphin; Bernat *v.* 1104
Alvarez; IBP, Inc. *v.* 1161
Amadasun *v.* Columbia Pictures Industries, Inc. 1126
Amaechi *v.* University of Ky., College of Ed. 1124
American Civil Liberties Union of Ky.; Harlan County *v.* 1152
American Civil Liberties Union of Ky.; McCreary County *v.* 844
American Civil Liberties Union of Ohio Foundation; DeWeese *v.* 1152
American Drug Stores, Inc.; Washington *v.* 1155
American Pelagic Fishing Co., L. P. *v.* United States 1139
American Trucking Assns., Inc. *v.* Michigan Pub. Serv. Comm'n 429
Anderson; Childs *v.* 1117
Anderson *v.* Nutter 1106
Anderson; Outler *v.* 1111
Anderson *v.* Parker 1133
Anderson; Thornblad *v.* 1116
Anyan; Montana *v.* 1110
Appleby *v.* Butler 1150
Arave; Leavitt *v.* 1105
Arbaugh *v.* Moonlight Cafe 1137
Arbaugh *v.* Y & H Corp. 1137
Arizona; Ochoa Guzman *v.* 1134
Arizona; Reyes Santana *v.* 1119
Arkansas; Engram *v.* 1142,1159
Arkansas Dept. of Health and Human Services *v.* Ahlborn 1165
Arkow *v.* Crosby 1117
Armstrong, *In re* 1103
Arpaio *v.* Demery 1139
Ash *v.* Ash 1141,1162
Ashe *v.* United States 1123
Ashiru, *In re* 1126
Ashworth *v.* Oklahoma 1117
Asper; Rose *v.* 1132
Athanasiades *v.* Edelman 1156
AT&T Corp.; Clancy *v.* 1154
Attorney General; Esquibes *v.* 1104
Attorney General; Jimenez Sanchez *v.* 1128
Attorney General; Madrid *v.* 1128
Attorney General; Mendoza Maldonado *v.* 1133
Attorney General *v.* O Centro Espírita Ben. União do Vegetal .. 1158

Page
Attorney General *v.* Oregon 1161
Attorney General; Patel *v.* 1103
Attorney General *v.* Raich 1
Attorney General; Rivera-Martinez *v.* 1142
Attorney General; Singh *v.* 1154
Attorney General; Wangunhardjo *v.* 1132
Attorney General; Woodruff *v.* 1148
Attorney General of Fla.; Stephens *v.* 1117,1159
Attorney General of Mo. *v.* Rumsfeld 1163
Attorney General of N. H. *v.* Planned Parenthood of No. New Eng. 1158
Austin; Wilkinson *v.* 209
Ayingono *v.* Beard 1146
Ayotte *v.* Planned Parenthood of Northern New England 1158
B. *v.* Farmer 1127
Bahrs *v.* McCann 1107,1162
Bailey *v.* Yukins 1118
Bajbor *v.* Office of Compliance 1115
Baker; Adams County/Ohio Valley School Bd. *v.* 1152
Baker; Johnson *v.* 1152
Ballentine *v.* Illinois State Police 1156
Bank of China, N. Y. Branch *v.* NBM L. L. C. 1138
Banuelos; Construction Laborers Pension Trust for Southern Cal. *v.* 1127
Barber Foods; Tum *v.* 1161
Barber Foods, Inc.; Tum *v.* 1161
Barker *v.* Castro 1143
Barnett *v.* Bledsoe 1147
Barnett; United States *v.* 1163
Barnhart; Gibler *v.* 1105,1154
Barnhart; Walker *v.* 1156
Barron; National Heritage Ins. Co. *v.* 1114
Bartel *v.* Dretke 1106
Bascom *v.* Fried 1155
Bass *v.* Madison 1103
Bass *v.* United States 1122
Bassiouni *v.* Central Intelligence Agency 1129
Bates; Dickerson *v.* 1111
Batty *v.* Tennis 1132
Baur *v.* Pennsylvania State Civil Service Comm'n 1139
Baussan *v.* United States 1137
Bautista *v.* Star Cruises 1136
Beard; Ayingono *v.* 1146
Beard; Hernandez Moreta *v.* 1146
Beard; Rompilla *v.* 374
Beck; Cleveland *v.* 1128

Page

Beck *v.* Minnesota 1142
Becker County; Cogger *v.* 1139
Beckett *v.* Texas 1105
Beckley *v.* Ohio 1107
Beckley *v.* United States 1163
Belardo *v.* United States 1152
Bell, *In re* 1113
Bell *v.* Abdur'Rahman 1151
Bell; House *v.* 1151
Bell *v.* Thompson 794,1158
Bell *v.* United States 1121,1123
Belleque; Rose *v.* 1144
Benetic *v.* M/Y ATHENA ALEXANDER 1115
Benford *v.* Williams 1108
Benigni *v.* Smith 1118
Berger *v.* United States 1101
Berghuis; Carless *v.* 1131,1159
Berghuis; Petersen *v.* 1119
Berke *v.* Kentucky 1115
Berkeley County Sheriff's Dept. and Detention Center; Johnson *v.* 1132
Bernat *v.* Allphin 1104
Berry *v.* Painter 1133,1160
Betts *v.* California 1133
Bieluch; Di Nardo *v.* 1118
Bilderback, *In re* 1126
Birkett; Jones *v.* 1112
Bismarck; Bosch *v.* 1141
Bitner; Jones *v.* 1132
Blackert *v.* Florida 1146,1160
Bladen County Child Support Agency; Corbin *v.* 1136
Blake; Maryland *v.* 1137
Blaney *v.* Johnson 1136
Blankenship *v.* Head 1150
Bledsoe; Barnett *v.* 1147
Blom *v.* United States 1156
Blue *v.* United States 1135
Bock; Richardson *v.* 1118
Bohac *v.* Walsh 1104
Bond *v.* Commissioner of Revenue of Minn. 1116
Bosch *v.* Bismarck 1141
Bosch *v.* Kansas 1111
Bowen *v.* United States 1105
Bowers *v.* United States 1124
Bowman *v.* Education America, Inc. 1124

Page
Boyd, *In re* 1126
Bradley *v.* United States 1101,1121
Bradshaw *v.* Stumpf 175
Bramwell *v.* Compton 1159
Brandon P. *v.* United States 1130
Brand X Internet Services; Federal Communications Comm'n *v.* 967
Brand X Internet Services; National Cable & Telecom. Assn. *v.* 967
Braxton; Zorumski *v.* 1144
Brewer *v.* Schalansky 1129
Briones *v.* United States 1122
Brooks *v.* United States 1106
Brotherhood. For labor union, see name of trade.
Brown *v.* Crawford 1123
Brown; Davis *v.* 1165
Brown *v.* Dretke 1132
Brown *v.* Montgomery County 1140
Brown *v.* O'Keffe 1112
Brown *v.* Pennsylvania 1133
Brown; Stafford *v.* 1147
Brown *v.* United States 1135
Bruce; Warren *v.* 1131
Bruce; Woodberry *v.* 1102
Buchanan *v.* Yarborough 1145
Buckeye Check Cashing, Inc. *v.* Cardegna 1127
Buculei *v.* United States 1156
Buda, *In re* 1126
Bullard; Alcan Aluminum Corp. *v.* 1105
Bunch *v.* Stalder 1156
Bureau *v.* Syntegra (USA), Inc. 1128
Bureau of Immigration and Customs Enforcement; Rosales *v.* ... 1101
Burgos *v.* United States 1148
Busby; Florida *v.* 1150
Bush; Perea *v.* 1150
Bustos-Torres *v.* United States 1109
Butler; Appleby *v.* 1150
Butler; Gentry *v.* 1154
Cacioppo; Dixon *v.* 1118
Cain; Wickem *v.* 1117
Calderon; Crittenden *v.* 1118
Caldwell *v.* U. S. District Court 1119,1159
California; Allen *v.* 1125
California; Betts *v.* 1133
California; Carpenter *v.* 1140
California; Combs *v.* 1107

Page
California; Gonzalez *v.* 1108
California; Johnson *v.* 162
California; Ortega *v.* 1144,1159
California; Reynoso *v.* 1127
California; Samson *v.* 1165
Campbell *v.* Detroit 1106
Campbell; Peoples *v.* 1142,1159
Cannon, *In re* 1113
Cardegna; Buckeye Check Cashing, Inc. *v.* 1127
Carey; Moore *v.* 1132
Carless *v.* Berghuis 1131,1159
Carpenter *v.* California 1140
Carranza *v.* Smith 1143
Carter *v.* Mitchell 1117
Carter *v.* Texas Dept. of Health 1146,1160
Caruso *v.* Morris 1129
Caruso *v.* Trustee of St. Jude Children's Research Hospital 1154
Cary *v.* Supreme Court of Va. 1150
Casey *v.* Moore 1146
Cason; Pearl *v.* 1154
Cason; Webb *v.* 1120
Castle Rock *v.* Gonzales 748
Castro; Barker *v.* 1143
Caterpillar Inc. *v.* Sturman Industries, Inc. 1114
Ceballos; Garcetti *v.* 1161
Central Intelligence Agency; Bassiouni *v.* 1129
Cerna-Salguero *v.* United States 1130
Certain Real Property Located at 105 Maki Lane; Strout *v.* 1119
Cesal *v.* United States 1101
Chavarry *v.* United States 1147,1162
Chavis; Lamarque *v.* 1126
Cheatham *v.* United States 1135
Chicago Brand Industrial, Inc. *v.* Mitutoyo Corp. 1129
Chieco *v.* Willis & Geiger 1123
Chikalla; Gray *v.* 1104
Childs *v.* Anderson 1117
Christakis *v.* McMahon 1150
Cincinnati; Davis *v.* 1106
Cintron Parrilla *v.* Eli Lilly Industries, Inc. 1123,1160
City. See name of city.
Clancy *v.* AT&T Corp. 1154
Clancy *v.* Comcast Corp. 1154
Clark *v.* Alabama 1130
Clark; Forde *v.* 1130

Page
Clark; Khotesouvan *v.* 1145
Clark *v.* McLeod 1111
Clark *v.* United States 1101
Claron Corp.; Dugas *v.* 1154
Clay, *In re* 1126
Clay *v.* Roper 1154
Clayton *v.* Runnels 1157
Cleveland *v.* Beck 1128
Cloutier *v.* Costco Wholesale Corp. 1131
Cogger *v.* Becker County 1139
Coke; Long Island Care at Home, Ltd. *v.* 1103
Colburn *v.* United States 1130
Cole *v.* Missouri 1131
Colida *v.* Sharp Electronics Corp. 1145
Collins; Hicks *v.* 1155
Collins; Rice *v.* 1151
Colorado; Smith *v.* 1108
Columbia Pictures Industries, Inc.; Amadasun *v.* 1126
Columbia Pictures Industries, Inc.; Moreno Ivanova *v.* 1115,1159
Combs *v.* California 1107
Comcast Corp.; Clancy *v.* 1154
Commissioner; Malis *v.* 1129
Commissioner; Said *v.* 1150
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Revenue of Minn.; Bond *v.* 1116
Commonwealth. See name of Commonwealth.
Compton; Bramwell *v.* 1159
Comstock Resources, Inc. *v.* Kennard 1139
ConAgra Refrigerated Foods; Unitherm Food Systems, Inc. *v.* .. 1161
Conklin *v.* Schofield 1111
Conklin *v.* Terry 1153
Connecticut; Richardson *v.* 1107
Conrad *v.* Dretke 1145
Construction Laborers Pension Trust for Southern Cal. *v.* Banuelos 1127
Conway; Crayton *v.* 1117
Conway; Muldrow *v.* 1145
Cooper; Tyson *v.* 1130
Cooper *v.* United States 1150
Coplan; Plch *v.* 1155
Corbin *v.* Bladen County Child Support Agency 1136
Corrections Commissioner. See name of commissioner.
Corsini; Currie *v.* 1141
Corzine *v.* 2005 Defense Base Closure and Realignment Comm'n 1163
Costco Wholesale Corp.; Cloutier *v.* 1131

Page
Cotney *v.* United States 1136
Coulter *v.* Illinois 1127,1158
County. See name of county.
Court of Appeals. See also U. S. Court of Appeals.
Court of Appeals of N. C.; Morris *v.* 1150
Covington; Walker *v.* 1131
Crank *v.* United States 1116
Crawford; Brown *v.* 1123
Crawford; Fields *v.* 1131
Crawford; Johnson *v.* 1120
Crawford *v.* United States 1110
Crayton *v.* Conway 1117
Credeur *v.* M J Oil, Inc. 1115
Credeur *v.* TransTexas Gas Corp. 1115
Crist; Stephens *v.* 1117,1159
Cristobal *v.* United States 1147
Criswell *v.* Watkins 1108
Critten *v.* Hancock 1106
Crittenden *v.* Calderon 1118
Crosby; Allen *v.* 1155
Crosby; Arkow *v.* 1117
Crosby; Day *v.* 1164
Crosby; Gomes Lages *v.* 1142
Crosby; Gonzalez *v.* 524
Crosby; Jones *v.* 1119
Crosby; Kelley *v.* 1149
Crosby; Lightbourne *v.* 1120
Crosby; Morales *v.* 1150
Crosby *v.* Nix 1114
Crosby; Peterka *v.* 1118
Crosby; Pitts *v.* 1154
Crosby; Scott *v.* 1117
Crosby; Strader *v.* 1117
Crosby; Wells *v.* 1108
Crosby; Widner *v.* 1124
Crosby; Williams *v.* 1131
Crosby; Wilson *v.* 1144
Crotts *v.* Ohio 1140
Crowder; Vora *v.* 1111
Cruz *v.* Hernandez 1142
Cumberbatch *v.* Florida 1119
Cunningham; Rodriguez *v.* 1120
Cuno; DaimlerChrysler Corp. *v.* 1165
Cuno; Wilkins *v.* 1165

Page
Cureaux *v.* United States 1134
Currie *v.* Corsini 1141
Curto *v.* Edmondson 1133
CW Capital, LLC; Mostoller *v.* 1114
Dabit; Merrill Lynch, Pierce, Fenner & Smith Inc. *v.* 1164
Dagher; Shell Oil Co. *v.* 1138
Dagher; Texaco Inc. *v.* 1138
Daigneault, *In re* 1157
DaimlerChrysler Corp. *v.* Cuno 1165
Dallas Observer; Isaacks *v.* 1105
Dancy *v.* United States 1122
Daniel *v.* Mills 1145
Darue Engineering & Mfg.; Grable & Sons Metal Products *v.* 308,1158
Davenport *v.* Woodford 1118
Davis *v.* Brown 1165
Davis *v.* Cincinnati 1106
Davis *v.* Lambert 1136
Davis *v.* United States 1124
Davis *v.* U. S. Congress 1154
Davis *v.* West Virginia 1140
Day *v.* Crosby 1164
Day *v.* Farwell 1133
Daytona Beach; Zurla *v.* 1124
Dean *v.* Texas 1118
Deeb, *In re* 1124
Deeb *v.* Sanders 1134
DeFoy; Patrick *v.* 1149
Delaware River and Bay Authority; Jackson *v.* 1149
De Los Santos-Mora *v.* United States 1149
Delray Beach Police Dept.; Moody *v.* 1120,1156
del Rosario Ortega *v.* Star-Kist Foods 546
Delta Air Lines, Inc.; All Direct Travel Services, Inc. *v.* 1104
Demery; Arpaio *v.* 1139
Demoulas; Kettenbach *v.* 1128
Denbow *v.* Texas 1144,1162
Department of Army; Howard *v.* 1129
Department of Ed.; National Wrestling Coaches Assn. *v.* 1104,1154
Department of Housing and Urban Development; Evans *v.* 1156
Department of Labor and Industry; Baur *v.* 1139
Department of Transportation; Whitman *v.* 1138
DeRosa; Toolasprashad *v.* 1122
Detroit; Campbell *v.* 1106
DeWeese *v.* American Civil Liberties Union of Ohio Foundation 1152
Deyerberg *v.* Woodward 1154

Page
Diamond; Janew Music *v.* 1114
Diamond; Newton *v.* 1114
DiBartolo *v.* Lehman 1120,1162
Dickerson *v.* Bates 1111
DiGuglielmo; Pace *v.* 1135
DiGuglielmo; Payne *v.* 1121
Di Nardo *v.* Bieluch 1118
Director, Dept. of Revenue, State of Mo.; Klingler *v.* 1111
Director of penal or correctional institution. See name or title of director.
Disch *v.* O'Donnell 1118
District Court. See also U. S. District Court.
District Court of Nev., Clark County; Rodriguez *v.* 1116
District of Columbia Court of Appeals; Stanton *v.* 1129
Dixon *v.* Cacioppo 1118
Dixon *v.* United States 1101,1121
Dobson *v.* United States 1109
Dock *v.* United States 1112
Dodd *v.* United States 353
Dolan *v.* U. S. Postal Service 1113
Dolenz *v.* Vail 1118
Dominguez Lizano *v.* United States 1135
Dormire; McMillen *v.* 1144,1162
Draughn *v.* Johnson 1144
Dretke; Bartel *v.* 1106
Dretke; Brown *v.* 1132
Dretke; Conrad *v.* 1145
Dretke; Garrett *v.* 1137,1143
Dretke; Hernandez *v.* 1143
Dretke; Hill *v.* 1143
Dretke; Jalomo Lopez *v.* 1156
Dretke; King *v.* 1132
Dretke; Mathis *v.* 1131
Dretke; Miller-El *v.* 231
Dretke; Patrick *v.* 1106
Dretke; Shelby *v.* 1131
Dretke; Shields *v.* 1160
Dretke; Sosa *v.* 1142
Dretke; Starcher *v.* 1144
Dretke; Sterling *v.* 1155
Dretke; Thomas *v.* 1155
Dretke; Witherspoon *v.* 1159
Drinkwater *v.* Parker, McCay & Criscuolo 1111
D. T. B. *v.* Farmer 1127

Page
Duarte *v.* Snedeker 1155
Dugas *v.* Claron Corp. 1154
Dumas *v.* Dumolt 1146
Dumolt; Dumas *v.* 1146
Dunlap *v.* Hathaway 1155
Dunlap *v.* Walker 1107
Dynegy Power Marketing; Public Util. Dist. 1 of Snohomish Cty. *v.* 1149
Dyson *v.* United States 1141
Eak *v.* Mechling 1136
Earl X; Howton *v.* 1151
Earthman *v.* Hines 1106
Eddings *v.* Junker 1128
Edelman; Athanasiades *v.* 1156
Edmondson; Curto *v.* 1133
Education America, Inc.; United States *ex rel.* Bowman *v.* 1124
Edwards *v.* United States 1134
Electrical & Electronics Ltd. *v.* Philips Domestic Appliances B. V. 1151
Electrical Workers; Moore *v.* 1115
Eli Lilly Industries, Inc.; Cintron Parrilla *v.* 1123,1160
Ellis *v.* Emery 1124
Ellis *v.* Liberty Life Assurance Co. of Boston 1128
El-Shifa Pharmaceutical Industries Co. *v.* United States 1139
Emery; Ellis *v.* 1124
EMR Network *v.* Federal Communications Comm'n 1116
English *v.* Alabama 1127
Engram *v.* Arkansas 1142,1159
Epstein, *In re* 1126
Esquibes *v.* Gonzales 1104
Estate. See name of estate.
Etheredge, *In re* 1103
Evans *v.* Department of Housing and Urban Development 1156
Exxon Mobil Corp. *v.* Allapattah Services, Inc. 546
Eyajan *v.* Smith 1155
Fallen *v.* United States 1147
Farmer; D. T. B. *v.* 1127
Farmer *v.* Powers 1146,1160
Farr *v.* Tennessee 1124
Farwell; Day *v.* 1133
Fassler *v.* Pendleton 1117
Fears *v.* Pennsylvania 1141
Federal Bureau of Prisons; Garraway *v.* 1132
Federal Bureau of Prisons; Mendoza-Gauna *v.* 1119
FCC *v.* Brand X Internet Services 967
FCC; EMR Network *v.* 1116

	Page
FCC; Media General, Inc. *v.*	1123
FCC; National Assn. of Broadcasters *v.*	1123
FCC; Newspaper Assn. of America *v.*	1123
FCC *v.* Prometheus Radio Project	1123
FCC; Sinclair Broadcast Group, Inc. *v.*	1123
FCC; Tribune Co. *v.*	1123
Federal Correctional Institution at McKean; Pineda Salgado *v.*	1147
Federal Election Comm'n; Wisconsin Right to Life, Inc. *v.*	1164
Federal Way School Dist. *v.* M. L.	1128
Felix; Lucent Technologies, Inc. *v.*	1149
Felix; Mayle *v.*	644,1158
Fields *v.* Crawford	1131
Fields *v.* Southwest Airlines Co.	1143
Fields *v.* Texas	1129
Figel *v.* Monroe	1143
Figel *v.* Riley	1105
Fitzgerald, *In re*	1102
Fitzpatrick *v.* Ohio	1130
Fleischer *v.* United States	1121
Florida; Blackert *v.*	1146,1160
Florida *v.* Busby	1150
Florida; Cumberbatch *v.*	1119
Florida; Huggins *v.*	1107
Florida; Jamerson *v.*	1133
Florida; Johnson *v.*	1144
Florida; Leonard *v.*	1145
Florida; McKay *v.*	1142
Florida; Roberti *v.*	1116
Florida; Stephens *v.*	1120
Flowers; Jones *v.*	1165
Floyd *v.* Maryland	1154
Fluellen *v.* United States	1147
Folden *v.* United States	1127
Folino; Johnson *v.*	1141
Fonseca, *In re*	1126
Fonseca *v.* Lamanna	1110
Forde *v.* Clark	1130
Fornaro *v.* Gannon	1140
Foster *v.* United States	1121
Fountain; Jefferson *v.*	1105
Fountain *v.* United States	1150
Fox; Paul *v.*	1154
Fox *v.* United States	1125
Foy *v.* United States	1147

Page
Frank; Owens *v.* 1118
Franklin *v.* United States 1106
Franklin Capital Corp.; Martin *v.* 1162
Fratta *v.* Texas 1105,1159
Fremonde *v.* New York City 1154
Fried; Bascom *v.* 1155
Frye *v.* United States 1141
Fuller *v.* Instinet, Inc. 1104
Gannon; Fornaro *v.* 1140
Garcetti *v.* Ceballos 1161
Garcia-Castillo *v.* United States 1134
Garcia-Mejia *v.* United States 1102
Garraway *v.* Federal Bureau of Prisons 1132
Garrett *v.* Dretke 1137,1143
Gay *v.* Lincoln Technical Institute Inc. 1154
GDF Realty Investments, Ltd. *v.* Norton 1114
Genesis Health Ventures, Inc.; Hayes *v.* 1129
Gentry *v.* Butler 1154
Georgia; Miller *v.* 1119
Georgia; Riley *v.* 1136
Georgia Dept. of Labor; Lamar-Hogan *v.* 1155
Georgia Pacific Corp.; Wright *v.* 1109
Gerber *v.* Agyeman 1128
Gesford *v.* Johnson 1143,1162
Gibler *v.* Barnhart 1105,1154
Gibson *v.* Mote 1120
Gibson *v.* United States 1134,1135
Giurbino; Qiang Huang *v.* 1146
Giurbino; Soria *v.* 1119
Givens *v.* Alabama Dept. of Corrections 1104
Goist *v.* United States 1122
Goldenstein *v.* United States 1156
Gomes Lages *v.* Crosby 1142
Gomez *v.* United States 1122
Gomez-Martinez *v.* United States 1135
Gonzales; Castle Rock *v.* 748
Gonzales; Esquibes *v.* 1104
Gonzales; Jimenez Sanchez *v.* 1128
Gonzales; Madrid *v.* 1128
Gonzales; Mendoza Maldonado *v.* 1133
Gonzales *v.* O Centro Espírita Beneficente União do Vegetal 1158
Gonzales *v.* Oregon 1161
Gonzales; Patel *v.* 1103
Gonzales *v.* Raich 1

Page
Gonzales; Rivera-Martinez *v.* 1142
Gonzales; Singh *v.* 1154
Gonzales; Wangunhardjo *v.* 1132
Gonzales; Woodruff *v.* 1148
Gonzalez *v.* California 1108
Gonzalez *v.* Crosby 524
Goodman *v.* Texas 1128
Governor of Tex. *v.* Perry 677
Grable & Sons Metal Products *v.* Darue Engineering & Mfg. .. 308,1158
Graham Cty. Soil & Water Conserv. Dist. *v.* U. S. *ex rel.* Wilson .. 409,1158
Graves *v.* ITT Educational Services, Inc. 1124
Gray *v.* Chikalla 1104
Gray *v.* Louisiana 1143
Gray *v.* Mississippi 1130
Grayer; Simmons *v.* 1148
Great Falls *v.* Wynne 1152
Green *v.* United States 1137,1160
Greenhill, *In re* 1113
Greenwood *v.* Wetzel 1148
Griffin *v.* Pennsylvania 1148
Grimes *v.* Wetzel 1148
Grokster, Ltd.; Metro-Goldwyn-Mayer Studios Inc. *v.* 913
Gross, *In re* 1126
Grubbs; United States *v.* 1164
Grynberg *v.* Praxair, Inc. 1139
Guerrero-Moreno *v.* United States 1110
Gustave *v.* Stansberry 1148
Guzek *v.* Oregon 1124
Guzman *v.* Arizona 1134
Hairston *v.* U. S. Court of Appeals 1162
Halbert *v.* Michigan 605,1113
Hale *v.* United States 1112
Hall, *In re* 1102
Hall; Jimenez *v.* 1107
Hall; Mitleider *v.* 1143
Hall; Royal Caribbean Cruises Ltd. *v.* 1114
Hall *v.* Texas 1141
Hallock; Will *v.* 1103
Hamilton *v.* Texas 1130
Hamilton *v.* United States 1148,1160
Hamilton Partners; Kinney *v.* 1115
Hamilton Sundstrand Corp.; Honeywell International Inc. *v.* 1127
Hanas *v.* Michigan 1135
Hancock; Critten *v.* 1106

Page
Hanft; Padilla *v.* 1123
Hardisty *v.* YMCA of Greater Seattle 1143
Harlan County *v.* American Civil Liberties Union of Ky. 1152
Harley *v.* Adler 1154
Harris *v.* Michigan 1151
Harris *v.* Mississippi 1117
Harris *v.* New Jersey 1145
Harris *v.* United States 1110
Harris *v.* Walsh 1142
Harrison *v.* United States 1137,1160
Hartman *v.* Moore 1138
Hathaway; Dunlap *v.* 1155
Hayes *v.* Genesis Health Ventures, Inc. 1129
Head; Blankenship *v.* 1150
Hearn *v.* Illinois 1136
Hedrick; Abdullah *v.* 1147
Hedrick; Miller *v.* 1147
Hembree *v.* United States 1112,1154
Hemet *v.* Smith 1128
Hendricks *v.* Rushton 1154
Herbin *v.* Johnson 1108
Hernandez; Cruz *v.* 1142
Hernandez *v.* Dretke 1143
Hernandez *v.* United States 1110
Hernandez Moreta *v.* Beard 1146
Hewlett-Packard Emp. Bens. Income Protection Plan *v.* Jebian .. 1139
Hickey *v.* United States 1164
Hicks *v.* Collins 1155
Hicks *v.* Ohio 1133
Hightower *v.* Schofield 1124
Hilderbrand *v.* United States 1121
Hill *v.* Dretke 1143
Hines; Earthman *v.* 1106
Hirsch; Madden *v.* 1146
Hobart; White *v.* 1116
Hoevenaar *v.* Lazaroff 1101
Hoff *v.* Office of Personnel Management 1129
Hohmann *v.* Wood 1107,1156
Hohmann *v.* Wood Oberholtzer 1107,1156
Holbrook *v.* United States 1125,1162
Holder; Rocha *v.* 1121
Holland *v.* United States 1101
Holmes *v.* South Carolina 1164
Holt *v.* Office of State Attorney for Eleventh Judicial Circuit of Fla. 1106

Page
Holton *v.* United States 1148
Honeywell International Inc. *v.* Hamilton Sundstrand Corp. 1127
Honeywell International Inc. *v.* Interfaith Community Org. 1129
Hood *v.* Texas 1146
Hornaday *v.* United States 1134
Horne *v.* Smith 1159
Horner *v.* Texas 1116
House *v.* Bell 1151
Houser; Mitrano *v.* 1104
Housing Authority of Paterson; Ali *v.* 1131
Howard *v.* Department of Army 1129
Howard *v.* United States 1122
Howard *v.* West Virginia 1146,1160
Howton *v.* Earl X 1151
Huang *v.* Giurbino 1146
Hudson *v.* Michigan 1138
Huggins *v.* Florida 1107
Huggins *v.* United States 1135
Hughes *v.* Mississippi 1130
Hummingway *v.* United States 1156
Huntley Project School Dist. #24; Rogers *v.* 1113
Hurley; Nero *v.* 1142
Hutman *v.* United States 1148
IBP, Inc. *v.* Alvarez 1161
Idaho; Porter *v.* 1143
Illinois; Coulter *v.* 1127,1158
Illinois; Hearn *v.* 1136
Illinois; West *v.* 1133
Illinois; Williams *v.* 1133
Illinois State Police; Ballentine *v.* 1156
Illinois Tool Works Inc. *v.* Independent Ink, Inc. 1127,1162
Independent Ink, Inc.; Illinois Tool Works Inc. *v.* 1127,1162
Indiana; Kirby *v.* 1146
In re. See name of party.
Instinet, Inc.; Fuller *v.* 1104
Integra Lifesciences I, Ltd.; Merck KGaA *v.* 193
Integrated Telecom Express, Inc. *v.* NMSBPCSLDHB, L. P. 1110
Interfaith Community Organization; Honeywell International *v.* 1129
International. For labor union, see name of trade.
Introcaso *v.* United States 1148,1160
Isaacks *v.* Dallas Observer 1105
Isaacks *v.* New Times, Inc. 1105
Ismel *v.* United States 1148
ITT Educational Services, Inc.; United States *ex rel.* Graves *v.* .. 1124

Page
Ivanova *v.* Columbia Pictures Industries, Inc. 1115,1159
Jackson, *In re* 1103
Jackson *v.* Delaware River and Bay Authority 1149
Jackson *v.* Sikeston Police Dept. 1154
Jackson; Spooner *v.* 1120
Jackson *v.* True 1160
Jackson *v.* United States 1105
Jackson *v.* Wilson 1132
Jaffer *v.* National Caucus & Center on Black Aged, Inc. 1111
Jalomo Lopez *v.* Dretke 1156
Jamerson *v.* Florida 1133
Janew Music *v.* Diamond 1114
Jebian; Hewlett-Packard Emp. Bens. Income Protection Plan *v.* ... 1139
Jefferson *v.* Fountain 1105
Jernigan *v.* Tulsa *ex rel.* Palmer 1140
Jett; Sicroff *v.* 1139
Jimenez *v.* Hall 1107
Jimenez-Muchaca *v.* United States 1149
Jimenez Sanchez *v.* Gonzales 1128
Johnson *v.* Baker 1152
Johnson *v.* Berkeley County Sheriff's Dept. and Detention Center 1132
Johnson; Blaney *v.* 1136
Johnson *v.* California 162
Johnson *v.* Crawford 1120
Johnson; Draughn *v.* 1144
Johnson *v.* Florida 1144
Johnson *v.* Folino 1141
Johnson; Gesford *v.* 1143,1162
Johnson; Herbin *v.* 1108
Johnson; Justice *v.* 1150
Johnson *v.* Maryland Dept. of Pub. Safety & Correctional Servs. 1108
Johnson *v.* Ponder 1120
Johnson; Robinson *v.* 1113
Johnson; Yowel *v.* 1113
Johnston *v.* Roper 1160
Jones, *In re* 1138
Jones *v.* Birkett 1112
Jones *v.* Bitner 1132
Jones *v.* Crosby 1119
Jones *v.* Flowers 1165
Jones *v.* Pennsylvania 1121
Jones *v.* Saleeby 1155
Jones *v.* United States 1123,1125,1130
J. P. Morgan Chase & Co.; Kwiatkowski *v.* 1155

Page

Judge, Circuit Court of Mich., Third Circuit; Dunlap *v.* 1155
Judge, Circuit Court of Washington County; Mead *v.* 1133
Judge, Court of Common Pleas, Richland County *v.* ACLU of Ohio 1152
Judge, District Court of Utah, Second District; Bernat *v.* 1104
Junker; Eddings *v.* 1128
Justice *v.* Johnson 1150
Kahawaiolaa *v.* Norton 1114
Kandies *v.* Polk 1137
Kansas; Bosch *v.* 1111
Kaplan, Inc.; Koger *v.* 1124
Karten, *In re* 1102
Kasper; Adkins *v.* 1104
Kelley *v.* Crosby 1149
Kelley *v.* Wilkinson 1124
Kelly; Weir *v.* 1140
Kelo *v.* New London 469,1158
Kennard; Comstock Resources, Inc. *v.* 1139
Kentucky; Berke *v.* 1115
Kentucky; Thompson *v.* 1142
Kepple *v.* New Hampshire 1116
Keselica *v.* Stouffer 1107,1159
Kettenbach *v.* Demoulas 1128
Keup *v.* Wisconsin Dept. of Health and Family Services 1149
Khotesouvan *v.* Clark 1145
Kim's Auto & Truck Service, Inc. *v.* Toledo 1152
King *v.* Dretke 1132
King *v.* Thomas 1155
Kinnard *v.* Rutherford County Bd. of Ed. 1140
Kinney *v.* Hamilton Partners 1115
Kirby *v.* Indiana 1146
Kirchoff *v.* United States 1130
Klingler *v.* Director, Dept. of Revenue, State of Mo. 1111
Koger *v.* Kaplan, Inc. 1124
Kohl; Mead *v.* 1133
Krassner *v.* Whiting 1131
Kucera *v.* United States 1149
Kwiatkowski *v.* J. P. Morgan Chase & Co. 1155
Kyler; Richardson *v.* 1109
L.; Federal Way School Dist. *v.* 1128
Labor Union. See name of trade.
Lackey *v.* United States 1142
LaFarge Corp. *v.* Olden 1152
Lages *v.* Crosby 1142
Laila *v.* United States 1116

Page
Lake *v.* Washington 1120
Lamanna; Fonseca *v.* 1110
Lamar-Hogan *v.* Georgia Dept. of Labor 1155
Lamarque *v.* Chavis 1126
Lamarque; Palmer *v.* 1107
Lambert; Davis *v.* 1136
Lambros *v.* United States 1135
Lane; Mendoza *v.* 1155
Larry *v.* United States 1147
Laudumiey, *In re* 1102
Lauer *v.* Texas 1145
Lazaroff; Hoevenaar *v.* 1101
Leavitt *v.* Arave 1105
Ledford *v.* United States 1122
Lee *v.* United States 1141
Lehman; DiBartolo *v.* 1120,1162
Leibach; Miranda *v.* 1133
Leonard *v.* Florida 1145
Leslie *v.* Superior Court of Cal., San Francisco County 1119
Levy *v.* United States 1101
Lewis; Lucas *v.* 1106
Liangsiriprasert *v.* United States 1110
Liberty Life Assurance Co. of Boston; Ellis *v.* 1128
Lightbourne *v.* Crosby 1120
Lightfoot *v.* United States 1109
Lilly Industries, Inc.; Cintron Parrilla *v.* 1123,1160
Lincoln Technical Institute Inc.; United States *ex rel.* Gay *v.* 1154
Lively *v.* United States 1105
Lizano *v.* United States 1135
Lizzi *v.* Washington Metropolitan Area Transit Authority 1116
Lloyd *v.* United States 1110
Local. For labor union, see name of trade.
Lockenvitz, *In re* 1125
Lockhart *v.* South Carolina 1144
Long Island Care at Home, Ltd. *v.* Coke 1103
Loos; Rose *v.* 1107
Lopez *v.* Dretke 1156
Los Angeles; Satalich *v.* 1115
Louisiana; Gray *v.* 1143
Louisiana; Oxley *v.* 1128
Louisiana; Snyder *v.* 1137
Louisville; Martingale, LLC *v.* 1115
Love *v.* Ryan 1143
Love *v.* United States 1110

Page
Lovitt *v.* True 1152
Lubowa *v.* United States 1112
Lucas *v.* Lewis 1106
Lucent Technologies, Inc. *v.* Felix 1149
Lucero *v.* United States 1109,1159
Lyons *v.* United States 1109
Madden *v.* Hirsch 1146
Madison; Bass *v.* 1103
Madrid *v.* Gonzales 1128
Majid *v.* United States 1147
Maldonado *v.* Gonzales 1133
Malis *v.* Commissioner 1129
Mango *v.* United States 1141
Manion *v.* Nagin 1128
Marcicky *v.* Renico 1142
Marian *v.* Superior Court of Cal., Ventura County 1142
Marino *v.* Texas 1119,1159
Marks *v.* Unknown 1106
Marmol *v.* United States 1122
Marshall *v.* Marshall 1165
Marshall *v.* Mississippi 1107
Martin *v.* Franklin Capital Corp. 1162
Martinez, *In re* 1153
Martinez *v.* Texas 1153
Martingale, LLC *v.* Louisville 1115
Maryland *v.* Blake 1137
Maryland; Floyd *v.* 1154
Maryland Dept. of Pub. Safety & Correctional Servs.; Johnson *v.* 1108
Masko *v.* United States 1155
Mason *v.* United States 1148
Mathieson *v.* United States 1134
Mathis *v.* Dretke 1131
Maxwell-Hodges; Allen *v.* 1156
Mayle *v.* Felix 644,1158
McCain *v.* Tennis 1108
McCann; Bahrs *v.* 1107,1162
McCarthy *v.* Texas 1117
McCollough, *In re* 1102
McCrarey; Ryan *v.* 1104
McCray *v.* McKee 1145
McCreary County *v.* American Civil Liberties Union of Ky. 844
McDonald *v.* United States 1134
McDuffie *v.* Neely 1120
McFarling *v.* Monsanto Co. 1139

Page
McGrath; Turner *v.* 1144
McKay *v.* Florida 1142
McKee; McCray *v.* 1145
McKee; Morris *v.* 1145
McKune; Strope *v.* 1120
McLaurin *v.* United States 1104
McLeod; Clark *v.* 1111
McLittle *v.* Thompson 1117
McMahon; Christakis *v.* 1150
McMillen *v.* Dormire 1144,1162
McMorris *v.* Werner 1137
McMurray; Rose *v.* 1132
McReynolds *v.* United States 1110
Mead *v.* Kohl 1133
Mead *v.* Murgo 1133
Mead *v.* Oregon 1133
Mechling; Eak *v.* 1136
Media General, Inc. *v.* Federal Communications Comm'n 1123
Mendon; Smith *v.* 1137
Mendoza *v.* Lane 1155
Mendoza-Gauna *v.* Federal Bureau of Prisons 1119
Mendoza Maldonado *v.* Gonzales 1133
Merck KGaA *v.* Integra Lifesciences I, Ltd. 193
Merrill Lynch, Pierce, Fenner & Smith Inc. *v.* Dabit 1164
Metal-Lite, Inc.; Slip Track Systems, Inc. *v.* 1116
Metrish; Simmons *v.* 1151
Metro-Goldwyn-Mayer Studios Inc. *v.* Grokster, Ltd. 913
Metropolitan Transit Authority; Murphy *v.* 1135
Michigan; Halbert *v.* 605,1113
Michigan; Hanas *v.* 1135
Michigan; Harris *v.* 1151
Michigan; Hudson *v.* 1138
Michigan; Mims *v.* 1118
Michigan; Robinson *v.* 1145
Michigan Parole Bd.; Porter *v.* 1107,1156
Michigan Pub. Serv. Comm'n; American Trucking Assns., Inc. *v.* 429
Michigan Pub. Serv. Comm'n; Mid-Con Freight Systems, Inc. *v.* 440
Mid-Con Freight Systems, Inc. *v.* Michigan Pub. Serv. Comm'n .. 440
Miles *v.* United States 1122
Miller *v.* Georgia 1119
Miller *v.* Hedrick 1147
Miller *v.* United States 1101,1150
Miller-El *v.* Dretke 231
Mills; Daniel *v.* 1145

Page
Mims *v.* Michigan 1118
Minnesota; Beck *v.* 1142
Minnesota; Petschl *v.* 1119
Miranda *v.* Leibach 1133
Mississippi; Gray *v.* 1130
Mississippi; Harris *v.* 1117
Mississippi; Hughes *v.* 1130
Mississippi; Marshall *v.* 1107
Mississippi; Torns *v.* 1137
Missouri; Cole *v.* 1131
Missouri; Wright *v.* 1144
Mitchell; Carter *v.* 1117
Mitchem; Wright *v.* 1152,1159
Mitleider *v.* Hall 1143
Mitrano *v.* Houser 1104
Mitutoyo Corp.; Chicago Brand Industrial, Inc. *v.* 1129
M J Oil, Inc.; Credeur *v.* 1115
M. L.; Federal Way School Dist. *v.* 1128
Moeck; Wisconsin *v.* 1111
Mollinger-Wilson *v.* Quizno's Franchise Co. 1154
Monroe; Figel *v.* 1143
Monsanto Co.; McFarling *v.* 1139
Montana *v.* Anyan 1110
Montgomery County; Brown *v.* 1140
Moody *v.* Delray Beach Police Dept. 1120,1156
Moonlight Cafe; Arbaugh *v.* 1137
Moore *v.* Carey 1132
Moore; Casey *v.* 1146
Moore *v.* Electrical Workers 1115
Moore; Hartman *v.* 1138
Moore *v.* United States 1109
Moorman, *In re* 1126
Morales *v.* Crosby 1150
Morales-De Jesus *v.* United States 1130
Moreland's Estate *v.* Speybroeck 1115
Moreno Ivanova *v.* Columbia Pictures Industries, Inc. 1115,1159
Moreta *v.* Beard 1146
Morgan *v.* SKF USA, Inc. 1114
Morgan Chase & Co.; Kwiatkowski *v.* 1155
Morris; Caruso *v.* 1129
Morris *v.* Court of Appeals of N. C. 1150
Morris *v.* McKee 1145
Moskowitz *v.* United States 1141
Mosley *v.* United States 1109

Page
Mostoller *v.* CW Capital, LLC 1114
Mote; Gibson *v.* 1120
Muldrow *v.* Conway 1145
Mullin; Turrentine *v.* 1106
Munawwar *v.* Woodwest Realty 1159
Murgo; Mead *v.* 1133
Murphy *v.* Metropolitan Transit Authority 1135
M/Y ATHENA ALEXANDER; Benetic *v.* 1115
Nagin; Manion *v.* 1128
Nance *v.* United States 1116
Nash *v.* New York 1119
National Assn. of Broadcasters *v.* FCC 1123
National Cable & Telecom. Assn. *v.* Brand X Internet Services .. 967
National Caucus & Center on Black Aged, Inc.; Jaffer *v.* 1111
National Heritage Ins. Co. *v.* United States *ex rel.* Barron 1114
National Organization for Women, Inc.; Operation Rescue *v.* .. 1151,1158
National Organization for Women, Inc.; Scheidler *v.* 1151,1158
National Wrestling Coaches Assn. *v.* Department of Ed. 1104,1154
Navy Commander, Consolidated Naval Brig; Padilla *v.* 1123
NBM L. L. C.; Bank of China, N. Y. Branch *v.* 1138
Neely; McDuffie *v.* 1120
Nero *v.* Hurley 1142
Neuman, *In re* 1102
Nevada Landing Partnership; Simmons *v.* 1140
New Hampshire; Kepple *v.* 1116
New Jersey; Harris *v.* 1145
New Jersey; Ray *v.* 1155
New London; Kelo *v.* 469,1158
Newman *v.* United States 1117
Newspaper Assn. of America *v.* FCC 1123
New Times, Inc.; Isaacks *v.* 1105
Newton, *In re* 1163
Newton *v.* Diamond 1114
Newton *v.* Texas 1163
New York; Nash *v.* 1119
New York; Page *v.* 1132
New York; Wynter *v.* 1111
New York City; Fremonde *v.* 1154
New York City Housing Auth., Constr. Dept.; Tariq-Shuaib *v.* ... 1114
Nix; Crosby *v.* 1114
Nixon *v.* Rumsfeld 1163
Niznik *v.* Store-To-Door, Corp. 1113
NMSBPCSLDHB, L. P.; Integrated Telecom Express, Inc. *v.* ... 1110
Nortel Networks Corp.; Rates Technology Inc. *v.* 1141

Page

North Carolina; Strobel *v.* 1140
Norton, *In re* 1103
Norton; GDF Realty Investments, Ltd. *v.* 1114
Norton; Kahawaiolaa *v.* 1114
Norwegian Cruise Line Ltd.; Spector *v.* 119
Nutter; Anderson *v.* 1106
Nzongola, *In re* 1124
Oberholtzer; Hohmann *v.* 1107,1156
Obi *v.* Texas 1154
O Centro Espírita Beneficente União do Vegetal; Gonzales *v.* ... 1158
Ochoa Guzman *v.* Arizona 1134
O'Donnell; Disch *v.* 1118
Office of Compliance; Bajbor *v.* 1115
Office of Personnel Management; Hoff *v.* 1129
Office of State Attorney for Eleventh Judicial Circuit of Fla.; Holt *v.* 1106
Ohio; Ahmed *v.* 1124
Ohio; Beckley *v.* 1107
Ohio; Crotts *v.* 1140
Ohio; Fitzpatrick *v.* 1130
Ohio; Hicks *v.* 1133
Ohio; Talley *v.* 1107
Ohio; Young *v.* 1106
O'Keffe; Brown *v.* 1112
Oklahoma; Ashworth *v.* 1117
Oklahoma; Pennington *v.* 1153
Oklahoma; Sallahdin *v.* 1153
Okpala *v.* United States 1137
Olden; LaFarge Corp. *v.* 1152
Olds, *In re* 1102
Olson *v.* Teamsters 1139
O'Neill *v.* Richland County Bd. 1111
19th Judicial District Court of La.; Wells *v.* 1132,1159
Operation Rescue *v.* National Organization for Women, Inc. 1151,1158
Oregon; Gonzales *v.* 1161
Oregon; Guzek *v.* 1124
Oregon; Mead *v.* 1133
Oregon; Potts *v.* 1111
Orff *v.* United States 596
Orleans Parish City Government Judicial Branch; Treece *v.* 1124
Ortega *v.* California 1144,1159
Ortega-Ramirez *v.* United States 1149
Ortiz *v.* Ortiz 1108
Ortiz; Saiz *v.* 1146
Oster *v.* Sutton 1150

Page
Ouellette; Wright Electric, Inc. *v.* 1128
Ounousian *v.* United States 1122
Outler *v.* Anderson 1111
Owens *v.* Frank 1118
Oxley *v.* Louisiana 1128
P. *v.* United States 1130
Pace *v.* Alabama 1108
Pace *v.* DiGuglielmo 1135
Pacheco-Espinosa *v.* United States 1109
Padilla *v.* Hanft 1123
Page *v.* New York 1132
Paige *v.* Shannon 1109
Painter; Berry *v.* 1133,1160
Palacios *v.* United States 1123,1160
Palisades Med. Ctr., N. Y. Presby. Healthcare Sys.; Robredo *v.* .. 1159
Palmer; Jernigan *v.* 1140
Palmer *v.* Lamarque 1107
Parker; Anderson *v.* 1133
Parker, McCay & Criscuolo; Drinkwater *v.* 1111
Parks *v.* United States 1150
Parrilla *v.* Eli Lilly Industries, Inc. 1123,1160
Pasquantino *v.* United States 1135
Patel; Aguilar *v.* 1108,1162
Patel *v.* Gonzales 1103
Patrick *v.* DeFoy 1149
Patrick *v.* Dretke 1106
Paul *v.* Fox 1154
Payne *v.* DiGuglielmo 1121
Payne; Root *v.* 1141
Payne *v.* United States 1105
Pearl *v.* Cason 1154
Pearson *v.* United States 1154
Pedraza, *In re* 1156
Pendleton; Fassler *v.* 1117
Pennington *v.* Oklahoma 1153
Pennsylvania; Brown *v.* 1133
Pennsylvania; Fears *v.* 1141
Pennsylvania; Griffin *v.* 1148
Pennsylvania; Jones *v.* 1121
Pennsylvania; Smith *v.* 1108
Pennsylvania State Civil Service Comm'n; Baur *v.* 1139
Peoples *v.* Alabama 1164
Peoples *v.* Campbell 1142,1159
Perea *v.* Bush 1150

Page
Perry; Van Orden *v.* 677
Peterka *v.* Crosby 1118
Petersen *v.* Berghuis 1119
Petschl *v.* Minnesota 1119
Pettus; Skinner *v.* 1144
Petway *v.* Virginia 1107,1159
Philips Domestic Appliances B. V.; Electrical & Electronics Ltd. *v.* 1151
Pineda Salgado *v.* Federal Correctional Institution at McKean .. 1147
Pippen, *In re* 1125
Pippins *v.* Tangipahoa Parish Council 1140
Pittman *v.* United States 1111
Pitts *v.* Crosby 1154
Planned Parenthood of Northern New England; Ayotte *v.* 1158
Plch *v.* Coplan 1155
Podlog *v.* United States 1147
Polk; Kandies *v.* 1137
Ponder; Johnson *v.* 1120
Poole, *In re* 1125
Porter *v.* Idaho 1143
Porter *v.* Michigan Parole Bd. 1107,1156
Porter *v.* Porter 1146
Postmaster General; Seattle Housing and Resource Effort *v.* 1127
Postmaster General; Steiner *v.* 1140
Potter; Seattle Housing and Resource Effort *v.* 1127
Potter; Steiner *v.* 1140
Potts *v.* Oregon 1111
Powers; Farmer *v.* 1146,1160
Prairie Band Potawatomi Nation; Wagnon *v.* 1161
Praxair, Inc.; United States *ex rel.* Grynberg *v.* 1139
President of U. S.; Perea *v.* 1150
Price, *In re* 1103,1159
Price *v.* Reid 1150
Pri-Har *v.* United States 1134
Proctor *v.* United States 1110
Prometheus Radio Project; Federal Communications Comm'n *v.* 1123
Public Util. Dist. 1 of Snohomish Cty. *v.* Dynegy Power Marketing 1149
Purkerson *v.* Schriro 1146,1162
QAD Inc.; Subramanian *v.* 1141
Qiang Huang *v.* Giurbino 1146
Quinn *v.* United States 1121
Quintana *v.* Adams 1130
Quizno's Franchise Co.; Mollinger-Wilson *v.* 1154
Raich; Gonzales *v.* 1
Ramirez; Sancho *v.* 1155

	Page
Ramirez-Gonzalez *v.* United States	1147
Ramirez-Robles *v.* United States	1154
Randall *v.* Sorrell	1165
Randall; Sorrell *v.*	1165
Rates Technology Inc. *v.* Nortel Networks Corp.	1141
Ray *v.* New Jersey	1155
Reeder-Simco GMC, Inc.; Volvo Trucks North America, Inc. *v.*	1161
Reid; Price *v.*	1150
Renico; Marcicky *v.*	1142
Renico; Woods *v.*	1155
Reyad, *In re*	1138
Reyes *v.* United States	1130
Reyes Santana *v.* Arizona	1119
Reynolds *v.* White	1159
Reynoso *v.* California	1127
Rice *v.* Collins	1151
Rice *v.* United States	1136
Richardson *v.* Bock	1118
Richardson *v.* Connecticut	1107
Richardson *v.* Kyler	1109
Richland County Bd.; O'Neill *v.*	1111
Rickard, *In re*	1125
Riley; Figel *v.*	1105
Riley *v.* Georgia	1136
Rivera *v.* United States	1152
Rivera-Martinez *v.* Gonzales	1142
Rivers *v.* Wilson	1118
RLI Ins. Co.; Veranda Beach, LLC *v.*	1139
Robert Half International, Inc.; Rowe *v.*	1155
Roberti *v.* Florida	1116
Robinson *v.* Johnson	1113
Robinson *v.* Michigan	1145
Robredo *v.* Palisades Med. Ctr., N. Y. Presby. Healthcare Sys.	1159
Rocha *v.* Holder	1121
Rodriguez *v.* Cunningham	1120
Rodriguez *v.* District Court of Nev., Clark County	1116
Rodriguez *v.* United States	1127
Rodriguez-Herrera *v.* United States	1130
Rogers *v.* Huntley Project School Dist. #24	1113
Rogers *v.* San Antonio	1129
Rollins *v.* Smith	1111
Romain *v.* United States	1122
Rompilla *v.* Beard	374
Root *v.* Payne	1141

Page

Roper; Clay *v.* 1154
Roper; Johnston *v.* 1160
Rosales *v.* Bureau of Immigration and Customs Enforcement ... 1101
Rose *v.* Asper 1132
Rose *v.* Belleque 1144
Rose *v.* Loos 1107
Rose *v.* McMurray 1132
Rose Acre Farms, Inc. *v.* United States 1104
Rose Acre Farms, Inc.; United States *v.* 1104
Rowe *v.* Robert Half International, Inc. 1155
Royal Caribbean Cruises Ltd. *v.* Hall 1114
Ruddick *v.* U. S. District Court 1145,1159
Rumsfeld; Nixon *v.* 1163
Runnels; Clayton *v.* 1157
Rushton; Hendricks *v.* 1154
Russo, *In re* 1102
Ruth *v.* United States 1108
Rutherford County Bd. of Ed.; Kinnard *v.* 1140
Ryan; Love *v.* 1143
Ryan *v.* McCrarey 1104
Ryan; Taylor *v.* 1119,1159
Ryan; Williams *v.* 1120
Safie *v.* Safie 1104
Said *v.* Commissioner 1150
St. John-Thompson *v.* United States 1134
Saiz *v.* Ortiz 1146
Saleeby; Jones *v.* 1155
Salgado *v.* Federal Correctional Institution at McKean 1147
Sallahdin *v.* Oklahoma 1153
Samson *v.* California 1165
San Antonio; Rogers *v.* 1129
Sanchez *v.* Gonzales 1128
Sanchez *v.* United States 1101
Sanchez-Luna *v.* United States 1134
Sancho *v.* Ramirez 1155
Sanders; Deeb *v.* 1134
San Francisco; San Remo Hotel, L. P. *v.* 323
San Remo Hotel, L. P. *v.* San Francisco 323
Santana *v.* Arizona 1119
Satalich *v.* Los Angeles 1115
Satterlee *v.* Washington 1104
Saunders *v.* United States 1114
Savage *v.* United States 1102,1121,1157
Schaffer *v.* Weast 1158

Page
Schalansky; Brewer *v.* 1129
Scheidler *v.* National Organization for Women, Inc. 1151,1158
Scheurich, *In re* 1103
Schmidt; Wachovia Bank, N. A. *v.* 1113,1158
Schofield; Conklin *v.* 1111
Schofield; Hightower *v.* 1124
Schriro; Purkerson *v.* 1146,1162
Schwartz; Waters *v.* 1155
Scott *v.* Crosby 1117
Scott *v.* United States 1124
Seabold; Szabo *v.* 1131
Seattle Housing and Resource Effort *v.* Potter 1127
Secretary of Defense; Nixon *v.* 1163
Secretary of the Interior; GDF Realty Investments, Ltd. *v.* 1114
Secretary of the Interior; Kahawaiolaa *v.* 1114
Security Enforcement Bureau of N. Y., Inc.; Walls *v.* 1155
Segura *v.* Alexander 1107
Senton, *In re* 1103
Serafin, *In re* 1113
Settle *v.* United States 1102
Shannon; Paige *v.* 1109
Sharp Electronics Corp.; Colida *v.* 1145
Shelby *v.* Dretke 1131
Shell Oil Co. *v.* Dagher 1138
Shepard *v.* United States 1110
Shields *v.* Dretke 1160
Shimek *v.* United States 1147
Shouman *v.* United States 1109
Sibley, *In re* 1103,1156
Sibley *v.* Alabama 1156
Sicroff *v.* Jett 1139
Sikeston Police Dept.; Jackson *v.* 1154
Silvia, *In re* 1125
Simmons *v.* Grayer 1148
Simmons *v.* Metrish 1151
Simmons *v.* Nevada Landing Partnership 1140
Simmons-Goff, *In re* 1126,1159
Sinclair Broadcast Group, Inc. *v.* FCC 1123
Singh *v.* Gonzales 1154
SKF USA, Inc.; Morgan *v.* 1114
Skinner *v.* Pettus 1144
Slip Track Systems, Inc. *v.* Metal-Lite, Inc. 1116
Sloan, *In re* 1113
Smalls *v.* United States 1121

	Page
Smart *v.* United States	1121
Smelser; Wansing *v.*	1155
Smith *v.* Akerlind	1131,1159
Smith; Benigni *v.*	1118
Smith; Carranza *v.*	1143
Smith *v.* Colorado	1108
Smith; Eyajan *v.*	1155
Smith; Hemet *v.*	1128
Smith; Horne *v.*	1159
Smith *v.* Mendon	1137
Smith *v.* Pennsylvania	1108
Smith; Rollins *v.*	1111
Smith; Sprint Communications Co., L. P. *v.*	1135
Smith; Truesdale *v.*	1122
Smith *v.* United States	1122
Smith; United States *v.*	1125
Smith *v.* Virginia	1155
Snedeker; Duarte *v.*	1155
Snyder *v.* Louisiana	1137
Soria *v.* Giurbino	1119
Sorrell *v.* Randall	1165
Sorrell; Randall *v.*	1165
Sorrell; Vermont Republican State Committee *v.*	1165
Sosa *v.* Dretke	1142
South Carolina; Holmes *v.*	1164
South Carolina; Lockhart *v.*	1144
South Carolina; Wood *v.*	1132
South Dakota; Warfield *v.*	1155
Southwest Airlines Co.; Fields *v.*	1143
Spector *v.* Norwegian Cruise Line Ltd.	119
Spencer, *In re*	1126
Speybroeck; Moreland's Estate *v.*	1115
Spielvogel *v.* United States	1138
Spooner *v.* Jackson	1120
Sprint Communications Co., L. P. *v.* Smith	1135
Stabile *v.* United States	1105
Stafford *v.* Brown	1147
Stalder; Bunch *v.*	1156
Staley *v.* Texas	1145
Stansberry; Gustave *v.*	1148
Stanton *v.* District of Columbia Court of Appeals	1129
Starcher *v.* Dretke	1144
Star Cruises; Bautista *v.*	1136
Star-Kist Foods; del Rosario Ortega *v.*	546

Page

State. See name of State.
Steiner *v.* Potter 1140
Steinmetz *v.* United States 1109,1160
Stephens *v.* Crist 1117,1159
Stephens *v.* Florida 1120
Stephens *v.* Union Carbide Corp. 1135
Sterling *v.* Dretke 1155
Sterling *v.* Texas 1157
Sterling *v.* West 1144
Stewart; United States *v.* 1112
Stokes *v.* United States 1121
Store-To-Door, Corp.; Niznik *v.* 1113
Stouffer; Keselica *v.* 1107,1159
Strader *v.* Crosby 1117
Strassburger, McKenna, Messer, Shilobod & Gutnick; Vora *v.* ... 1155
Stratton *v.* United States 1156
Strobel *v.* North Carolina 1140
Strope *v.* McKune 1120
Strout *v.* Certain Real Property Located at 105 Maki Lane 1119
Stumpf; Bradshaw *v.* 175
Sturman Industries, Inc.; Caterpillar Inc. *v.* 1114
Subramanian *v.* QAD Inc. 1141
Sukup *v.* United States 1121
Sullivan; Young *v.* 1150
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., San Francisco County; Leslie *v.* 1119
Superior Court of Cal., Ventura County; Marian *v.* 1142
Supreme Court of Va.; Cary *v.* 1150
Sutton; Oster *v.* 1150
Swift-Eckrich, Inc.; Unitherm Food Systems, Inc. *v.* 1161
Syntegra (USA), Inc.; Bureau *v.* 1128
Szabo *v.* Seabold 1131
Talley *v.* Ohio 1107
Tangipahoa Parish Council; Pippins *v.* 1140
Tanner, *In re* 1126
Tariq-Shuaib *v.* New York City Housing Auth., Constr. Dept. ... 1114
Tax Comm'r for Ohio *v.* Cuno 1165
Taylor *v.* Ryan 1119,1159
Teamsters; Olson *v.* 1139
Teeples *v.* United States 1125
Tennessee; Farr *v.* 1124
Tennis; Batty *v.* 1132
Tennis; McCain *v.* 1108

Page

Terry; Conklin *v.* 1153
Texaco Inc. *v.* Dagher 1138
Texas; Beckett *v.* 1105
Texas; Dean *v.* 1118
Texas; Denbow *v.* 1144,1162
Texas; Fields *v.* 1129
Texas; Fratta *v.* 1105,1159
Texas; Goodman *v.* 1128
Texas; Hall *v.* 1141
Texas; Hamilton *v.* 1130
Texas; Hood *v.* 1146
Texas; Horner *v.* 1116
Texas; Lauer *v.* 1145
Texas; Marino *v.* 1119,1159
Texas; Martinez *v.* 1153
Texas; McCarthy *v.* 1117
Texas; Newton *v.* 1163
Texas; Obi *v.* 1154
Texas; Staley *v.* 1145
Texas; Sterling *v.* 1157
Texas; Wiebelhaus *v.* 1131
Texas Dept. of Health; Carter *v.* 1146,1160
Thomas *v.* Dretke 1155
Thomas; King *v.* 1155
Thomas *v.* United States 1109,1121,1125
Thomas *v.* Virginia 1117
Thompson; Bell *v.* 794,1158
Thompson *v.* Kentucky 1142
Thompson; McLittle *v.* 1117
Thornblad *v.* Anderson 1116
Todd *v.* Todd 1118,1159
Toledo; Kim's Auto & Truck Service, Inc. *v.* 1152
Toolasprashad *v.* DeRosa 1122
Torns *v.* Mississippi 1137
Torres *v.* United States 1112,1122
Torres-Amador *v.* United States 1137
Town. See name of town.
Transport Workers; Yon *v.* 1106
TransTexas Gas Corp.; Credeur *v.* 1115
Treece *v.* Orleans Parish City Government Judicial Branch 1124
Trenkler *v.* U. S. District Court 1129
Tribune Co. *v.* Federal Communications Comm'n 1123
True; Jackson *v.* 1160
True; Lovitt *v.* 1152

Page
True; Wolfe *v.* 1153
Truesdale *v.* Smith 1122
Trustee of St. Jude Children's Research Hospital; Caruso *v.* 1154
Tscherter; White *v.* 1115
Tulloch *v.* United States 1147
Tulsa *ex rel.* Palmer; Jernigan *v.* 1140
Tum *v.* Barber Foods 1161
Tum *v.* Barber Foods, Inc. 1161
Turner *v.* McGrath 1144
Turner *v.* United States 1134
Turrentine, *In re* 1157
Turrentine *v.* Mullin 1106
2005 Defense Base Closure and Realignment Comm'n; Corzine *v.* 1163
Tyler *v.* United States 1149
Tyree *v.* United States 1135
Tyson *v.* Cooper 1130
Ullman *v.* United States 1111
Union. For labor union, see name of trade.
Union Carbide Corp.; Stephens *v.* 1135
United States. See name of other party.
U. S. Congress; Davis *v.* 1154
U. S. Court of Appeals; Hairston *v.* 1162
U. S. District Court; Caldwell *v.* 1119,1159
U. S. District Court; Ruddick *v.* 1145,1159
U. S. District Court; Trenkler *v.* 1129
United States Fire Ins. Co.; Warren *v.* 1157
U. S. Postal Service; Dolan *v.* 1113
U. S. Senator *v.* 2005 Defense Base Closure & Realign. Comm'n ... 1163
Unitherm Food Systems, Inc. *v.* ConAgra Refrigerated Foods ... 1161
Unitherm Food Systems, Inc. *v.* Swift-Eckrich, Inc. 1161
University of Ky., College of Ed.; Amaechi *v.* 1124
Unknown; Marks *v.* 1106
Vail; Dolenz *v.* 1118
Valentine *v.* United States 1116
Vance *v.* United States 1134
VanGuilder *v.* United States 1115
Van Orden *v.* Perry 677
Veranda Beach, LLC *v.* RLI Ins. Co. 1139
Vermont Republican State Committee *v.* Sorrell 1165
Vesey *v.* United States 1133
Vieth *v.* United States 1110
Virginia; Petway *v.* 1107,1159
Virginia; Smith *v.* 1155
Virginia; Thomas *v.* 1117

Page
Volis *v.* United States 1156
Volvo Trucks North America, Inc. *v.* Reeder-Simco GMC, Inc. .. 1161
Vora *v.* Crowder 1111
Vora *v.* Strassburger, McKenna, Messer, Shilobod & Gutnick 1155
Wachovia Bank, N. A. *v.* Schmidt 1113,1158
Wagnon *v.* Prairie Band Potawatomi Nation 1161
Walker *v.* Barnhart 1156
Walker *v.* Covington 1131
Walker; Dunlap *v.* 1107
Wall, *In re* 1124
Wallace *v.* United States 1150
Walls *v.* Security Enforcement Bureau of N. Y., Inc. 1155
Walsh; Bohac *v.* 1104
Walsh; Harris *v.* 1142
Wangunhardjo *v.* Gonzales 1132
Wansing *v.* Smelser 1155
Ward *v.* United States 1105,1159
Warden. See name of warden.
Ware *v.* United States 1148
Warfield *v.* South Dakota 1155
Warfield *v.* United States 1148
Warren *v.* Bruce 1131
Warren *v.* United States Fire Ins. Co. 1157
Washington *v.* American Drug Stores, Inc. 1155
Washington; Lake *v.* 1120
Washington; Satterlee *v.* 1104
Washington *v.* United States 1109
Washington Metropolitan Area Transit Authority; Lizzi *v.* 1116
Waters *v.* Schwartz 1155
Watkins; Criswell *v.* 1108
Watson *v.* United States 1134
Wauls *v.* Yarborough 1119
Weast; Schaffer *v.* 1158
Webb *v.* Cason 1120
Weir *v.* Kelly 1140
Wells *v.* Crosby 1108
Wells *v.* 19th Judicial District Court of La. 1132,1159
Werner; McMorris *v.* 1137
West *v.* Illinois 1133
West; Sterling *v.* 1144
West Virginia; Davis *v.* 1140
West Virginia; Howard *v.* 1146,1160
Wetzel; Greenwood *v.* 1148
Wetzel; Grimes *v.* 1148

Page

Whitaker, *In re* 1126
White *v.* Hobart 1116
White; Reynolds *v.* 1159
White *v.* Tscherter 1115
Whiting; Krassner *v.* 1131
Whitman *v.* Department of Transportation 1138
WH–T. V. Broadcasting Corp. *v.* Zenith Electronics Corp. 1140
Wickem *v.* Cain 1117
Widner *v.* Crosby 1124
Wiebelhaus *v.* Texas 1131
Wilkins *v.* Cuno 1165
Wilkinson *v.* Austin 209
Wilkinson; Kelley *v.* 1124
Will *v.* Hallock 1103
Williams, *In re* 1156
Williams; Benford *v.* 1108
Williams *v.* Crosby 1131
Williams *v.* Illinois 1133
Williams *v.* Ryan 1120
Williams *v.* United States 1122,1156
Willis & Geiger; Chieco *v.* 1123
Wilson *v.* Crosby 1144
Wilson; Graham County Soil & Water Conservation Dist. *v.* ... 409,1158
Wilson; Jackson *v.* 1132
Wilson; Rivers *v.* 1118
Wilson *v.* United States 1122,1134
Wingate *v.* United States 1155
Wisconsin *v.* Moeck 1111
Wisconsin Dept. of Health and Family Services; Keup *v.* 1149
Wisconsin Right to Life, Inc. *v.* Federal Election Comm'n 1164
Witherspoon *v.* Dretke 1159
Wolfe *v.* True 1153
Wood, *In re* 1102
Wood; Hohmann *v.* 1107,1156
Wood *v.* South Carolina 1132
Woodberry *v.* Bruce 1102
Woodford; Davenport *v.* 1118
Wood Oberholtzer; Hohmann *v.* 1107,1156
Woodruff *v.* Gonzales 1148
Woods *v.* Renico 1155
Woodward; Deyerberg *v.* 1154
Woodwest Realty; Munawwar *v.* 1159
Wright *v.* Georgia Pacific Corp. 1109
Wright *v.* Missouri 1144

Page
Wright *v.* Mitchem 1152,1159
Wright Electric, Inc. *v.* Ouellette 1128
Wynne; Great Falls *v.* 1152
Wynter *v.* New York 1111
Yarborough; Buchanan *v.* 1145
Yarborough; Wauls *v.* 1119
Y & H Corp.; Arbaugh *v.* 1137
Yon *v.* Transport Workers 1106
Young *v.* Ohio 1106
Young *v.* Sullivan 1150
YMCA of Greater Seattle; Hardisty *v.* 1143
Yowel *v.* Johnson 1113
Yukins; Bailey *v.* 1118
Zenith Electronics Corp.; WH–T. V. Broadcasting Corp. *v.* 1140
Zorumski *v.* Braxton 1144
Zurla *v.* Daytona Beach 1124

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2004

GONZALES, ATTORNEY GENERAL, ET AL. *v.* RAICH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1454. Argued November 29, 2004—Decided June 6, 2005

California's Compassionate Use Act authorizes limited marijuana use for medicinal purposes. Respondents Raich and Monson are California residents who both use doctor-recommended marijuana for serious medical conditions. After federal Drug Enforcement Administration agents seized and destroyed all six of Monson's cannabis plants, respondents brought this action seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. Respondents claim that enforcing the CSA against them would violate the Commerce Clause and other constitutional provisions. The District Court denied respondents' motion for a preliminary injunction, but the Ninth Circuit reversed, finding that they had demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress' Commerce Clause authority as applied to the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law. The court relied heavily on *United States* v. *Lopez*, 514 U. S. 549, and *United States* v. *Morrison*, 529 U. S. 598, to hold that this separate class of purely local activities was beyond the reach of federal power.

Syllabus

Held: Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law. Pp. 10–33.

(a) For the purposes of consolidating various drug laws into a comprehensive statute, providing meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthening law enforcement tools against international and interstate drug trafficking, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II of which is the CSA. To effectuate the statutory goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. 21 U. S. C. §§ 841(a)(1), 844(a). All controlled substances are classified into five schedules, § 812, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body, §§ 811, 812. Marijuana is classified as a Schedule I substance, § 812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment, § 812(b)(1). This classification renders the manufacture, distribution, or possession of marijuana a criminal offense. §§ 841(a)(1), 844(a). Pp. 10–15.

(b) Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce is firmly established. See, *e. g.*, *Perez* v. *United States*, 402 U. S. 146, 151. If Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. See, *e. g.*, *id.*, at 154–155. Of particular relevance here is *Wickard* v. *Filburn*, 317 U. S. 111, 127–128, where, in rejecting the appellee farmer's contention that Congress' admitted power to regulate the production of wheat for commerce did not authorize federal regulation of wheat production intended wholly for the appellee's own consumption, the Court established that Congress can regulate purely intrastate activity that is not itself "commercial," *i. e.*, not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. The similarities between this case and *Wickard* are striking. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. In assessing the scope of Congress' Commerce Clause authority, the Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *E. g.*, *Lopez*, 514 U. S., at 557. Given the en-

forcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U. S. C. §801(5), and concerns about diversion into illicit channels, the Court has no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Pp. 15–22.

(c) Respondents' heavy reliance on *Lopez* and *Morrison* overlooks the larger context of modern-era Commerce Clause jurisprudence preserved by those cases, while also reading those cases far too broadly. The statutory challenges at issue there were markedly different from the challenge here. Respondents ask the Court to excise individual applications of a concededly valid comprehensive statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for the Court has often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U. S., at 154. Moreover, the Court emphasized that the laws at issue in *Lopez* and *Morrison* had nothing to do with "commerce" or any sort of economic enterprise. See *Lopez*, 514 U. S., at 561; *Morrison*, 529 U. S., at 610. In contrast, the CSA regulates quintessentially economic activities: the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational means of regulating commerce in that product. The Ninth Circuit cast doubt on the CSA's constitutionality by isolating a distinct class of activities that it held to be beyond the reach of federal power: the intrastate, noncommercial cultivation, possession, and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law. However, Congress clearly acted rationally in determining that this subdivided class of activities is an essential part of the larger regulatory scheme. The case comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the CSA's findings and the undisputed magnitude of the commercial market for marijuana, *Wickard* and its progeny foreclose that claim. Pp. 23–33.

352 F. 3d 1222, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 33. O'CONNOR, J., filed a dissenting

opinion, in which REHNQUIST, C. J., and THOMAS, J., joined as to all but Part III, *post*, p. 42. THOMAS, J., filed a dissenting opinion, *post*, p. 57.

Acting Solicitor General Clement argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, Lisa S. Blatt, Mark B. Stern, Alisa B. Klein,* and *Mark T. Quinlivan.*

Randy E. Barnett argued the cause for respondents. With him on the brief were *Robert A. Long, Jr., Heidi C. Doerhoff, Robert A. Raich,* and *David M. Michael.**

---

*Briefs of *amici curiae* urging reversal were filed for the Community Rights Counsel by *Timothy J. Dowling;* for the Drug Free America Foundation, Inc., et al. by *David G. Evans;* for Robert L. DuPont, M. D., et al. by *John R. Bartels, Jr.;* and for U. S. Representative Mark E. Souder et al. by *Nicholas P. Coleman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Troy King,* Attorney General of Alabama, *Kevin C. Newsom,* Solicitor General, *Charles C. Foti, Jr.,* Attorney General of Louisiana, and *Jim Hood,* Attorney General of Mississippi; for the State of California et al. by *Bill Lockyer,* Attorney General of California, *Richard M. Frank,* Chief Deputy Attorney General, *Manuel M. Medeiros,* State Solicitor, *Taylor S. Carey,* Special Assistant Attorney General, *J. Joseph Curran, Jr.,* Attorney General of Maryland, and *Christine O. Gregoire,* Attorney General of Washington; for the California Nurses Association et al. by *Julia M. Carpenter;* for the Cato Institute by *Douglas W. Kmiec, Timothy Lynch,* and *Robert A. Levy;* for Constitutional Law Scholars by *Ernest A. Young, Matthew D. Schnall, Charles Fried,* and *David L. Shapiro;* for the Institute for Justice by *William H. Mellor, Dana Berliner,* and *Richard A. Epstein;* for the Leukemia & Lymphoma Society et al. by *David T. Goldberg, Sean H. Donahue,* and *Daniel N. Abrahamson;* for the Lymphoma Foundation of America et al. by *Stephen C. Willey;* for the Marijuana Policy Project et al. by *Cheryl Flax-Davidson;* and for the National Organization for the Reform of Marijuana Laws et al. by *John Wesley Hall, Jr., Joshua L. Dratel,* and *Sheryl Gordon McCloud.*

Briefs of *amici curiae* were filed for the Pacific Legal Foundation by *M. Reed Hopper, Sharon L. Browne,* and *Deborah J. La Fetra;* and for the Reason Foundation by *Manuel S. Klausner.*

JUSTICE STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes.[1] The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

I

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana,[2] and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996.[3] The proposition was de-

[1] See Alaska Stat. §§ 11.71.090, 17.37.010–17.37.080 (Lexis 2004); Colo. Const., Art. XVIII, § 14, Colo. Rev. Stat. § 18–18–406.3 (Lexis 2004); Haw. Rev. Stat. §§ 329–121 to 329–128 (2004 Cum. Supp.); Me. Rev. Stat. Ann., Tit. 22, § 2383–B(5) (West 2004); Nev. Const., Art. 4, § 38, Nev. Rev. Stat. §§ 453A.010–453A.810 (2003); Ore. Rev. Stat. §§ 475.300–475.346 (2003); Vt. Stat. Ann., Tit. 18, §§ 4472–4474d (Supp. 2004); Wash. Rev. Code §§ 69.51.010–69.51.080 (2004); see also Ariz. Rev. Stat. Ann. § 13–3412.01 (West Supp. 2004) (voter initiative permitting physicians to prescribe Schedule I substances for medical purposes that was purportedly repealed in 1997, but the repeal was rejected by voters in 1998). In November 2004, Montana voters approved Initiative 148, adding to the number of States authorizing the use of marijuana for medical purposes.

[2] 1913 Cal. Stats. ch. 342, § 8*a*; see also Gieringer, The Origins of Cannabis Prohibition in California 21–23 (rev. Mar. 2005), available at http://www.canorml.org/background/caloriginsmjproh.pdf (all Internet materials as visited June 2, 2005, and available in Clerk of Court's case file).

[3] Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2005). The California Legislature recently enacted additional legislation supplementing the Compassionate Use Act. §§ 11362.7–11362.9.

signed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps toward ensuring the safe and affordable distribution of the drug to patients in need.[4] The Act creates an exemption from criminal prosecution for physicians,[5] as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.[6] A "primary caregiver" is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.[7]

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use

---

[4] "The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

"(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

"(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

"(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." § 11362.5(b)(1).

[5] "Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes." § 11362.5(c).

[6] "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." § 11362.5(d).

[7] § 11362.5(e).

Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), 84 Stat. 1242, 21 U. S. C. § 801 *et seq.*, to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts

to obtain relief with conventional medications, and the opinions of their doctors concerning their need to use marijuana. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity.

The District Court denied respondents' motion for a preliminary injunction. *Raich* v. *Ashcroft*, 248 F. Supp. 2d 918 (ND Cal. 2003). Although the court found that the federal enforcement interests "wane[d]" when compared to the harm that California residents would suffer if denied access to medically necessary marijuana, it concluded that respondents could not demonstrate a likelihood of success on the merits of their legal claims. *Id.*, at 931.

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the District Court to enter a preliminary injunction.[8] *Raich* v. *Ashcroft*, 352 F. 3d 1222 (2003). The court found that respondents had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority." *Id.*, at 1227. The Court of Appeals distinguished prior Circuit cases upholding the CSA in the face of Commerce Clause challenges by focusing on what it deemed to be the *"separate and distinct class of activities"* at issue in this case: "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." *Id.*, at 1228. The

---

[8] On remand, the District Court entered a preliminary injunction enjoining petitioners "'from arresting or prosecuting Plaintiffs Angel McClary Raich and Diane Monson, seizing their medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against them with respect to the intrastate, non-commercial cultivation, possession, use, and obtaining without charge of cannabis for personal medical purposes on the advice of a physician and in accordance with state law, and which is not used for distribution, sale, or exchange.'" Brief for Petitioners 9.

court found the latter class of activities "different in kind from drug trafficking" because interposing a physician's recommendation raises different health and safety concerns, and because "this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Ibid.*

The majority placed heavy reliance on our decisions in *United States* v. *Lopez*, 514 U. S. 549 (1995), and *United States* v. *Morrison*, 529 U. S. 598 (2000), as interpreted by recent Circuit precedent, to hold that this separate class of purely local activities was beyond the reach of federal power. In contrast, the dissenting judge concluded that the CSA, as applied to respondents, was clearly valid under *Lopez* and *Morrison;* moreover, he thought it "simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard* v. *Filburn.*" 352 F. 3d, at 1235 (opinion of Beam, J.).

The obvious importance of the case prompted our grant of certiorari. 542 U. S. 936 (2004). The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals.

II

Shortly after taking office in 1969, President Nixon declared a national "war on drugs."[9] As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.[10] That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236.

This was not, however, Congress' first attempt to regulate the national market in drugs. Rather, as early as 1906 Congress enacted federal legislation imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug traveling in interstate commerce.[11] Aside from these labeling restrictions, most domestic drug regulations prior to 1970 generally came in the guise of revenue laws, with the Department of the Treasury serving as the Federal Government's primary enforcer.[12] For example, the primary drug control law, before being repealed by the passage of the CSA, was the Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970). The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against

---

[9] See D. Musto & P. Korsmeyer, The Quest for Drug Control 60 (2002) (hereinafter Musto & Korsmeyer).

[10] H. R. Rep. No. 91–1444, pt. 2, p. 22 (1970) (hereinafter H. R. Rep.); 26 Congressional Quarterly Almanac 531 (1970) (hereinafter Almanac); Musto & Korsmeyer 56–57.

[11] Pure Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768, repealed by Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059.

[12] See *United States* v. *Doremus*, 249 U. S. 86 (1919); *Leary* v. *United States*, 395 U. S. 6, 14–16 (1969).

parties so registered, and by regulating the issuance of prescriptions.[13]

Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act, 50 Stat. 551 (repealed 1970).[14] Like the Harrison Act, the Marihuana Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands.[15] Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements.[16] Noncompliance exposed traffickers to severe federal penalties, whereas compliance would often subject them to prosecution under state law.[17] Thus, while the Marihuana Tax Act did not declare the drug illegal *per se*, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.

Then in 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. A number of noteworthy events precipitated

---

[13] See *Doremus*, 249 U. S., at 90–93.

[14] R. Bonnie & C. Whitebread, The Marijuana Conviction 154–174 (1999); L. Grinspoon & J. Bakalar, Marihuana, the Forbidden Medicine 7–8 (rev. ed. 1997) (hereinafter Grinspoon & Bakalar). Although this was the Federal Government's first attempt to regulate the marijuana trade, by this time all States had in place some form of legislation regulating the sale, use, or possession of marijuana. R. Isralowitz, Drug Use, Policy, and Management 134 (2d ed. 2002).

[15] *Leary*, 395 U. S., at 14–16.

[16] Grinspoon & Bakalar 8.

[17] *Leary*, 395 U. S., at 16–18.

this policy shift. First, in *Leary* v. *United States*, 395 U. S. 6 (1969), this Court held certain provisions of the Marihuana Tax Act and other narcotics legislation unconstitutional. Second, at the end of his term, President Johnson fundamentally reorganized the federal drug control agencies. The Bureau of Narcotics, then housed in the Department of the Treasury, merged with the Bureau of Drug Abuse Control, then housed in the Department of Health, Education, and Welfare (HEW), to create the Bureau of Narcotics and Dangerous Drugs, currently housed in the Department of Justice.[18] Finally, prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act.[19]

Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.[20] Congress was particularly concerned with the

---

[18] Musto & Korsmeyer 32–35; 26 Almanac 533. In 1973, the Bureau of Narcotics and Dangerous Drugs became the DEA. See Reorg. Plan No. 2 of 1973, § 1, 28 CFR § 0.100 (1973).

[19] The Comprehensive Drug Abuse Prevention and Control Act of 1970 consists of three titles. Title I relates to the prevention and treatment of narcotic addicts through HEW (now the Department of Health and Human Services). 84 Stat. 1238. Title II, as discussed in more detail above, addresses drug control and enforcement as administered by the Attorney General and the DEA. *Id.*, at 1242. Title III concerns the import and export of controlled substances. *Id.*, at 1285.

[20] In particular, Congress made the following findings:

"(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

need to prevent the diversion of drugs from legitimate to illicit channels.[21]

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U. S. C. §§ 841(a)(1), 844(a). The CSA categorizes all controlled substances into five schedules. § 812. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body.

"(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

"(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

"(A) after manufacture, many controlled substances are transported in interstate commerce,

"(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

"(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

"(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

"(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

"(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U. S. C. §§ 801(1)–(6).

[21] See *United States* v. *Moore*, 423 U. S. 122, 135 (1975); see also H. R. Rep., at 22.

§§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. §§ 821–830. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. *Ibid.*; 21 CFR § 1301 *et seq.* (2004).

In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U. S. C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway."[22] Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. § 812(b)(2). By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. §§ 823(f), 841(a)(1), 844(a); see also *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 490 (2001).

The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between

---

[22] *Id.*, at 61 (quoting letter from Roger O. Egeberg, M. D., to Hon. Harley O. Staggers (Aug. 14, 1970)).

schedules. §811. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.[23]

III

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Brief for Respondents 22, 38. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States* v. *Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has

---

[23] Starting in 1972, the National Organization for the Reform of Marijuana Laws began its campaign to reclassify marijuana. Grinspoon & Bakalar 13–17. After some fleeting success in 1988 when an Administrative Law Judge (ALJ) declared that the DEA would be acting in an "unreasonable, arbitrary, and capricious" manner if it continued to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule III substance, *Grinspoon* v. *DEA*, 828 F. 2d 881, 883–884 (CA1 1987), the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's findings, 54 Fed. Reg. 53767 (1989), and since that time has routinely denied petitions to reschedule the drug, most recently in 2001. 66 Fed. Reg. 20038 (2001). The Court of Appeals for the District of Columbia Circuit has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order. See *Alliance for Cannabis Therapeutics* v. *DEA*, 15 F. 3d 1131, 1133 (1994).

evolved over time.[24] The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.[25] For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible.[26] Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379, and the Sherman Antitrust Act in 1890, 26 Stat. 209, as amended, 15 U. S. C. §2 *et seq.*[27]

Cases decided during that "new era," which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. *Perez* v. *United States*, 402 U. S. 146, 150 (1971). Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate

---

[24] *United States* v. *Lopez*, 514 U. S. 549, 552–558 (1995); *id.*, at 568–574 (KENNEDY, J., concurring); *id.*, at 604–607 (SOUTER, J., dissenting).

[25] See *Gibbons* v. *Ogden*, 9 Wheat. 1, 224 (1824) (opinion of Johnson, J.); Stern, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335, 1337, 1340–1341 (1934); G. Gunther, Constitutional Law 127 (9th ed. 1975).

[26] See *Lopez*, 514 U. S., at 553–554; *id.*, at 568–569 (KENNEDY, J., concurring); see also *Granholm* v. *Heald*, 544 U. S. 460, 472–473 (2005).

[27] *Lopez*, 514 U. S., at 554; see also *Wickard* v. *Filburn*, 317 U. S. 111, 121 (1942) ("It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder" (footnotes omitted)).

commerce. *Ibid.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Ibid.*; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937). Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, *e. g.*, *Perez*, 402 U. S., at 151; *Wickard* v. *Filburn*, 317 U. S. 111, 128–129 (1942). As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.*, at 125. We have never required Congress to legislate with scientific exactitude. When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. See *Perez*, 402 U. S., at 154–155 ("'[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so'" (quoting *Westfall* v. *United States*, 274 U. S. 256, 259 (1927))). In this vein, we have reiterated that when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *E. g.*, *Lopez*, 514 U. S., at 558 (quoting *Maryland* v. *Wirtz*, 392 U. S. 183, 196, n. 27 (1968); emphasis deleted).

Our decision in *Wickard*, 317 U. S. 111, is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn

argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." *Wickard*, 317 U. S., at 118. Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:

> "The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127–128.

Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.[28] Just as the Agricultural Adjustment Act was designed "to

---

[28] Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. App. 59, 74, 87. See also *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, 770, 774, n. 12, and 780, n. 17 (1994) (discussing the "market value" of marijuana); *id.*, at 790 (REHNQUIST, C. J., dissenting); *id.*, at 792 (O'CONNOR, J., dissenting); *Whalen* v. *Roe*, 429 U. S. 589, 591 (1977) (addressing prescription drugs "for which there is both a lawful and an unlawful market"); *Turner* v. *United States*, 396 U. S. 398, 417, n. 33 (1970) (referring to the purchase of drugs on the "retail market").

control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . " and consequently control the market price, *id.*, at 115, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. See nn. 20–21, *supra*. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. *Wickard*, 317 U. S., at 128. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.[29]

---

[29] To be sure, the wheat market is a lawful market that Congress sought to protect and stabilize, whereas the marijuana market is an unlawful market that Congress sought to eradicate. This difference, however, is of no constitutional import. It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particu-

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity"—a commercial farm—whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Filburn's own impact on the market was "trivial by itself" was not a sufficient reason for removing him from the scope of federal regulation. 317 U. S., at 127. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis. Moreover, even though Filburn was indeed a commercial farmer, the activity he was engaged in—the cultivation of wheat for home consumption—was not treated by the Court as part of his commercial farming operation.[30] And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA. See n. 20, *supra*. The

---

lar commodity. *Lopez*, 514 U. S., at 571 (KENNEDY, J., concurring) ("In the *Lottery Case*, 188 U. S. 321 (1903), the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit"); see also *Wickard*, 317 U. S., at 128 ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon").

[30] See *id.*, at 125 (recognizing that Filburn's activity "may not be regarded as commerce").

submissions of the parties and the numerous *amici* all seem to agree that the national, and international, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary pursuant to the 1938 statute.[31] Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, see *Lopez*, 514 U. S., at 562; *Perez*, 402 U. S., at 156, absent a special concern such as the protection of free speech, see, *e. g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 664–668 (1994) (plurality opinion). While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.[32]

---

[31] The Executive Office of the President has estimated that in 2000 American users spent $10.5 *billion* on the purchase of marijuana. Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb. 2004), http://www.whitehousedrugpolicy.gov/publications/factsht/marijuana/index.html.

[32] Moreover, as discussed in more detail above, Congress did make findings regarding the effects of intrastate drug activity on interstate commerce. See n. 20, *supra*. Indeed, even the Court of Appeals found that those findings "weigh[ed] in favor" of upholding the constitutionality of the CSA. 352 F. 3d 1222, 1232 (CA9 2003) (case below). The dissenters, however, would impose a new and heightened burden on Congress (unless the litigants can garner evidence sufficient to cure Congress' perceived "inadequa[cies]")—that legislation must contain detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme. *Post*, at 53–55 (opinion of O'CONNOR, J.); *post*, at 64 (opinion of THOMAS, J.). Such an exacting requirement is not only un-

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez*, 514 U. S., at 557; see also *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276–280 (1981); *Perez*, 402 U. S., at 155–156; *Katzenbach* v. *McClung*, 379 U. S. 294, 299–301 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 252–253 (1964). Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U. S. C. § 801(5), and concerns about diversion into illicit channels,[33] we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U. S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

---

precedented, it is also impractical. Indeed, the principal dissent's critique of Congress for "not even" including "declarations" specific to marijuana is particularly unpersuasive given that the CSA initially identified 80 other substances subject to regulation as Schedule I drugs, not to mention those categorized in Schedules II–V. *Post*, at 55 (opinion of O'CONNOR, J.). Surely, Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance contained therein in order to satisfy the dissenters' unfounded skepticism.

[33] See n. 21, *supra* (citing sources that evince Congress' particular concern with the diversion of drugs from legitimate to illicit channels).

IV

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly.

Those two cases, of course, are *Lopez*, 514 U. S. 549, and *Morrison*, 529 U. S. 598. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U. S., at 154 (quoting *Wirtz*, 392 U. S., at 193 (emphasis deleted)); see also *Hodel*, 452 U. S., at 308.

At issue in *Lopez*, 514 U. S. 549, was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. 104 Stat. 4844–4845, 18 U. S. C. § 922(q)(1)(A). The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. Distinguishing our earlier cases holding that comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce, we held the statute invalid. We explained:

> "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514 U. S., at 561.

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242–1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances—those listed in Schedules II through V—"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." 21 U. S. C. § 801(1). The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.

While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. 84 Stat. 1248. Marijuana was listed as the 10th item in the 3d subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut

unless the intrastate activity were regulated." *Lopez*, 514 U. S., at 561.[34] Our opinion in *Lopez* casts no doubt on the validity of such a program.

Nor does this Court's holding in *Morrison*, 529 U. S. 598. The Violence Against Women Act of 1994, 108 Stat. 1902, created a federal civil remedy for the victims of gender-motivated crimes of violence. 42 U. S. C. § 13981. The remedy was enforceable in both state and federal courts, and generally depended on proof of the violation of a state law. Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: " 'Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.' "[35] *Morrison*, 529 U. S., at 610.

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International

---

[34] The principal dissent asserts that by "[s]eizing upon our language in *Lopez*," *post*, at 46 (opinion of O'CONNOR, J.), *i. e.*, giving effect to our well-established case law, Congress will now have an incentive to legislate broadly. Even putting aside the political checks that would generally curb Congress' power to enact a broad and comprehensive scheme for the purpose of targeting purely local activity, there is no suggestion that the CSA constitutes the type of "evasive" legislation the dissent fears, nor could such an argument plausibly be made. *Post*, at 47 (O'CONNOR, J., dissenting).

[35] *Lopez*, 514 U. S., at 560; see also *id.*, at 573–574 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy").

Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.[36] Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." 352 F. 3d, at 1229. The court characterized this class as "different in kind from drug trafficking." *Id.*, at 1228. The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i. e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court

---

[36] See 16 U. S. C. §668(a) (bald and golden eagles); 18 U. S. C. §175(a) (biological weapons); §831(a) (nuclear material); §842(n)(1) (certain plastic explosives); §2342(a) (contraband cigarettes).

of Appeals was an essential part of the larger regulatory scheme.

First, the fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor. *Id.*, at 1229. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA "have a useful and legitimate medical purpose." 21 U. S. C. § 801(1). Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug,[37] the CSA would still impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements. See

[37] We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I. See, *e. g.*, Institute of Medicine, Marijuana and Medicine: Assessing the Science Base 179 (J. Joy, S. Watson, & J. Benson eds. 1999) (recognizing that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation"); see also *Conant* v. *Walters*, 309 F. 3d 629, 640–643 (CA9 2002) (Kozinski, J., concurring) (chronicling medical studies recognizing valid medical uses for marijuana and its derivatives). But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents' submission, if accepted, would place all homegrown medical substances beyond the reach of Congress' regulatory jurisdiction.

§§ 821–830; 21 CFR § 1301 *et seq.* (2004). Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval. *United States* v. *Rutherford*, 442 U. S. 544 (1979). Accordingly, the mere fact that marijuana—like virtually every other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

Nor can it serve as an "objective marke[r]" or "objective facto[r]" to arbitrarily narrow the relevant class as the dissenters suggest, *post*, at 47 (opinion of O'CONNOR, J.); *post*, at 68 (opinion of THOMAS, J.). More fundamentally, if, as the principal dissent contends, the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the "'outer limits' of Congress' Commerce Clause authority," *post*, at 42 (opinion of O'CONNOR, J.), it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those "'outer limits,'" whether or not a State elects to authorize or even regulate such use. JUSTICE THOMAS' separate dissent suffers from the same sweeping implications. That is, the dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the "'outer limits'" of Congress' Commerce Clause authority. One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the

naked eye," *Lopez*, 514 U. S., at 563, under any commonsense appraisal of the probable consequences of such an open-ended exemption.

Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be. *Wirtz*, 392 U. S., at 196 (quoting *Sanitary Dist. of Chicago* v. *United States*, 266 U. S. 405, 426 (1925)). See also 392 U. S., at 195–196; *Wickard*, 317 U. S., at 124 ("'[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress'"). Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, see, *e. g.*, *Morrison*, 529 U. S., at 661–662 (BREYER, J., dissenting) (noting that 38 States requested federal intervention), so too state action cannot circumscribe Congress' plenary commerce power. See *United States* v. *Darby*, 312 U. S. 100, 114 (1941) ("That power can neither be enlarged nor diminished by the exercise or non-exercise of state power").[38]

---

[38] That is so even if California's current controls (enacted eight years after the Compassionate Use Act was passed) are "effective," as the dissenters would have us blindly presume, *post*, at 53–54 (opinion of O'CONNOR, J.); *post*, at 63, 68 (opinion of THOMAS, J.). California's decision (made 34 years after the CSA was enacted) to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes," *post*, at 62 (THOMAS, J., dissenting), cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, JUSTICE THOMAS' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected. See *post*, at 41 (SCALIA, J., concurring in judgment) (quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 424 (1819)) ("'To impose on [Congress]

Respondents acknowledge this proposition, but nonetheless contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." Tr. of Oral Arg. 27. The dissenters fall prey to similar reasoning. See n. 38, *supra*, at 26 and this page. The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes, *post*, at 56 (opinion of O'CONNOR, J.), it is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to

---

the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution' ").

Moreover, in addition to casting aside more than a century of this Court's Commerce Clause jurisprudence, it is noteworthy that JUSTICE THOMAS' suggestion that States possess the power to dictate the extent of Congress' commerce power would have far-reaching implications beyond the facts of this case. For example, under his reasoning, Congress would be equally powerless to regulate, let alone prohibit, the intrastate possession, cultivation, and use of marijuana for *recreational* purposes, an activity which all States "strictly contro[l]." Indeed, his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens." *Post*, at 66 (dissenting opinion).

recommend marijuana use is open-ended. The authority to grant permission whenever the doctor determines that a patient is afflicted with "any other illness for which marijuana provides relief," Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A) (West Supp. 2005), is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic.[39] And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so.[40]

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market.[41] The likelihood that all such production will

---

[39] California's Compassionate Use Act has since been amended, limiting the catchall category to "[a]ny other chronic or persistent medical symptom that either: . . . [s]ubstantially limits the ability of the person to conduct one or more major life activities as defined" in the Americans with Disabilities Act of 1990, or "[i]f not alleviated, may cause serious harm to the patient's safety or physical or mental health." Cal. Health & Safety Code Ann. §§ 11362.7(h)(12)(A)–(B) (West Supp. 2005).

[40] See, *e. g.*, *United States* v. *Moore*, 423 U. S. 122 (1975); *United States* v. *Doremus*, 249 U. S. 86 (1919).

[41] The state policy allows patients to possess up to eight ounces of dried marijuana, and to cultivate up to 6 mature or 12 immature plants. Cal. Health & Safety Code Ann. § 11362.77(a) (West Supp. 2005). However, the quantity limitations serve only as a floor. Based on a doctor's recommendation, a patient can possess whatever quantity is necessary to satisfy his medical needs, and cities and counties are given *carte blanche* to establish more generous limits. Indeed, several cities and counties have done just that. For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana. Reply Brief for Petitioners 18–19 (citing Proposition 215 Enforcement Guidelines). Putting that quantity in perspective, 3 pounds of marijuana yields roughly 3,000 joints or cigarettes. Executive Office of the President, Office of National Drug Control Policy, What America's Users Spend on Illegal Drugs 24 (Dec. 2001), http://www.whitehousedrugpolicy.gov/publications/pdf/american_users_spend_2002.pdf. And the street price for that amount can range anywhere from $900 to $24,000. DEA, Illegal Drug Price and Purity Report (Apr. 2003) (DEA–02058).

promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.[42] Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so.[43] Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact JUSTICE O'CONNOR's dissent conveniently disregards in arguing that the demonstrated effect on commerce while admittedly "plausible" is ultimately "unsubstantiated," *post*, at 56, 55, Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." 352 F. 3d, at 1229. Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically

---

[42] For example, respondent Raich attests that she uses 2.5 ounces of cannabis a week. App. 82. Yet as a resident of Oakland, she is entitled to possess up to 3 pounds of processed marijuana at any given time, nearly 20 times more than she uses on a weekly basis.

[43] See, *e. g.*, *People ex rel. Lungren* v. *Peron*, 59 Cal. App. 4th 1383, 1386–1387, 70 Cal. Rptr. 2d 20, 23 (1997) (recounting how a Cannabis Buyers' Club engaged in an "indiscriminate and uncontrolled pattern of sale to thousands of persons among the general public, including persons who had not demonstrated any recommendation or approval of a physician and, in fact, some of whom were not under the care of a physician, such as undercover officers," and noting that "some persons who had purchased marijuana on respondents' premises were reselling it unlawfully on the street").

rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard* v. *Filburn* and the later cases endorsing its reasoning foreclose that claim.

V

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez* v. *United States*, 402 U. S. 146 (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the

channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Id.*, at 150; see *United States* v. *Morrison*, 529 U. S. 598, 608–609 (2000); *United States* v. *Lopez*, 514 U. S. 549, 558–559 (1995); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276–277 (1981). The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 189–190 (1824). The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States* v. *Coombs*, 12 Pet. 72 (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. *Id.*, at 78; *Katzenbach* v. *McClung*, 379 U. S. 294, 301–302 (1964); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942); *Shreveport Rate Cases*, 234 U. S. 342, 353 (1914); *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 39–40 (1895) (Harlan, J., dissenting).[1] And the category of "activities that substantially affect interstate commerce," *Lopez*, *supra*, at 559, is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws

---

[1] See also *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 584–585 (1985) (O'CONNOR, J., dissenting) (explaining that it is through the Necessary and Proper Clause that "an intrastate activity 'affecting' interstate commerce can be reached through the commerce power").

governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

I

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36–37 (1937). That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. See, *e. g.*, *Hodel*, *supra*, at 281 (surface coal mining); *Katzenbach*, *supra*, at 300 (discrimination by restaurants); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258 (1964) (discrimination by hotels); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237 (1948) (intrastate price fixing); *Board of Trade of Chicago* v. *Olsen*, 262 U. S. 1, 40 (1923) (activities of a local grain exchange); *Stafford* v. *Wallace*, 258 U. S. 495, 517, 524–525 (1922) (intrastate transactions at stockyard). *Lopez* and *Morrison* recognized the expansive scope of Congress's authority in this regard: "[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, *supra*, at 560; *Morrison*, *supra*, at 610 (same).

This principle is not without limitation. In *Lopez* and *Morrison*, the Court—conscious of the potential of the "substantially affects" test to "'obliterate the distinction between what is national and what is local,'" *Lopez*, *supra*, at 566–567

(quoting *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 554 (1935)); see also *Morrison*, *supra*, at 615–616—rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. *Lopez*, *supra*, at 564–566; *Morrison*, *supra*, at 617–618. "[I]f we were to accept [such] arguments," the Court reasoned in *Lopez*, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U. S., at 564; see also *Morrison*, *supra*, at 615–616. Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to "pile inference upon inference," *Lopez*, *supra*, at 567, in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in *Lopez*, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U. S., at 561. This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." *Wrightwood Dairy Co.*, *supra*, at 119; see also *United States* v. *Darby*, 312 U. S. 100, 118–119 (1941); *Shreveport Rate Cases*, *supra*, at 353. As the Court put it in *Wrightwood Dairy*, where Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make that regulation effective." 315 U. S., at 118–119.

Although this power "to make . . . regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce,[2] and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. See *Lopez*, *supra*, at 561. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. See *Darby*, *supra*, at 121.

In *Darby*, for instance, the Court explained that "Congress, having . . . adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards," 312 U. S., at 121, could not only require employers engaged in the production of goods for interstate commerce to conform to wage and hour standards, *id.*, at 119–121, but could also require those employers to keep employment records in order to demonstrate compliance with the regulatory scheme, *id.*, at 125. While the Court sustained the former regulation on the alternative ground that the activity it regulated could have a "great effect" on interstate commerce, *id.*, at 122–123, it affirmed the latter on the sole ground that "[t]he require-

[2] *Wickard* v. *Filburn*, 317 U. S. 111 (1942), presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress's price regulation by driving down prices in the market. *Id.*, at 127–129. This potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct. *Id.*, at 128–129.

ment for records even of the intrastate transaction is an appropriate means to the legitimate end," *id.*, at 125.

As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give "Congress . . . the authority to regulate the internal commerce of a State, as such," but it does allow Congress "to take all measures necessary or appropriate to" the effective regulation of the interstate market, "although intrastate transactions . . . may thereby be controlled." 234 U. S., at 353; see also *Jones & Laughlin Steel Corp.*, 301 U. S., at 38 (the logic of the *Shreveport Rate Cases* is not limited to instrumentalities of commerce).

II

Today's principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to little "more than a drafting guide." *Post*, at 46 (opinion of O'CONNOR, J.). I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its regulation of interstate commerce. See *Lopez*, *supra*, at 561; *ante*, at 18, 24–25. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local." *Lopez*, *supra*, at 567–568.

Lopez and *Morrison* affirm that Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond

the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case, 514 U. S., at 561, and *Morrison* did not even discuss the possibility that it was. (The Court of Appeals in *Morrison* made clear that it was not. See *Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F. 3d 820, 834–835 (CA4 1999) (en banc).) To dismiss this distinction as "superficial and formalistic," see *post*, at 47 (O'CONNOR, J., dissenting), is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421–422 (1819).

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch* v. *Maryland*, even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. *Id.*, at 421. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." *Ibid.* These phrases are not merely hortatory. For example, cases such as *Printz* v. *United States*, 521 U. S. 898 (1997), and *New York* v. *United States*, 505 U. S. 144 (1992), affirm that a law is not "'*proper* for carrying into Execution the Commerce Clause'" "[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz*, *supra*, at 923–924; see also *New York*, *supra*, at 166.

III

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid,

foster and protect the commerce, but embraces those which prohibit it." *Darby*, 312 U. S., at 113. See also *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 58 (1911); *Lottery Case*, 188 U. S. 321, 354 (1903). To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). See 21 U. S. C. §§ 841(a), 844(a). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State.[3]

---

[3] The principal dissent claims that, if this is sufficient to sustain the regulation at issue in this case, then it should also have been sufficient to sustain the regulation at issue in *United States* v. *Lopez*, 514 U. S. 549 (1995). See *post*, at 52 (arguing that "we could have surmised in *Lopez* that guns in school zones are 'never more than an instant from the interstate market' in guns already subject to extensive federal regulation, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act" (citation omitted)). This claim founders upon the shoals of *Lopez* itself, which made clear that the statute there at issue was "*not* an essential part of a larger regulation of economic activity." *Lopez*, *supra*, at 561 (emphasis added). On the dissent's view of things,

See *ante*, at 25–33. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. See *ante*, at 30, and n. 38. "To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." *McCulloch*, 4 Wheat., at 424.

Finally, neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation "inappropriate," *id.*, at 421—except to argue that the CSA regulates an area typically left to state regulation. See *post*, at 48, 51 (opinion of O'CONNOR, J.); *post*, at 66 (opinion of THOMAS, J.); Brief for Respondents 39–42. That is not enough to render federal regulation an inappropriate means. The Court has repeatedly recognized that, if authorized by the commerce power, Congress may regulate private endeavors "even when [that regulation] may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress." *National League of Cities* v. *Usery*, 426 U. S. 833, 840 (1976); see *Cleveland* v. *United States*, 329 U. S. 14, 19 (1946); *McCulloch*, *supra*, at 424. At bottom, respond-

---

that statement is inexplicable. Of course it is in addition difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1,000 feet of schools (and nowhere else). The dissent points to a federal law, 18 U. S. C. § 922(b)(1), barring licensed dealers from selling guns to minors, see *post*, at 52–53, but the relationship between the regulatory scheme of which § 922(b)(1) is a part (requiring all dealers in firearms that have traveled in interstate commerce to be licensed, see § 922(a)) and the statute at issue in *Lopez* approaches the nonexistent—which is doubtless why the Government did not attempt to justify the statute on the basis of that relationship.

ents' state-sovereignty argument reduces to the contention that federal regulation of the activities permitted by California's Compassionate Use Act is not sufficiently necessary to be "necessary and proper" to Congress's regulation of the interstate market. For the reasons given above and in the Court's opinion, I cannot agree.

* * *

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. See *Lopez*, 514 U. S., at 561. That is sufficient to authorize the application of the CSA to respondents.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. *United States* v. *Lopez*, 514 U. S. 549, 557 (1995); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937). One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. *Brecht* v. *Abrahamson*, 507 U. S. 619, 635 (1993); *Whalen* v. *Roe*, 429 U. S. 589, 603,

n. 30 (1977). Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez*, *supra*, and *United States* v. *Morrison*, 529 U. S. 598 (2000). Accordingly I dissent.

I

In *Lopez*, we considered the constitutionality of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone," 18 U. S. C. § 922(q)(2)(A). We explained that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i. e.*, those activities that substantially affect interstate commerce." 514 U. S., at 558–559 (citation omitted). This power derives from the conjunction of the Commerce Clause and the Necessary and Proper Clause. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 585–586 (1985) (O'CONNOR, J., dissenting) (explaining that *United States* v. *Darby*, 312 U. S. 100 (1941), *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110 (1942), and *Wickard* v. *Filburn*, 317 U. S. 111 (1942),

based their expansion of the commerce power on the Necessary and Proper Clause, and that "the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce"); *ante*, at 34 (SCALIA, J., concurring in judgment). We held in *Lopez* that the Gun-Free School Zones Act could not be sustained as an exercise of that power.

Our decision about whether gun possession in school zones substantially affected interstate commerce turned on four considerations. *Lopez*, *supra*, at 559–567; see also *Morrison*, *supra*, at 609–613. First, we observed that our "substantial effects" cases generally have upheld federal regulation of economic activity that affected interstate commerce, but that § 922(q) was a criminal statute having "nothing to do with 'commerce' or any sort of economic enterprise." *Lopez*, 514 U. S., at 561. In this regard, we also noted that "[s]ection 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Ibid.* Second, we noted that the statute contained no express jurisdictional requirement establishing its connection to interstate commerce. *Ibid.*

Third, we found telling the absence of legislative findings about the regulated conduct's impact on interstate commerce. We explained that while express legislative findings are neither required nor, when provided, dispositive, findings "enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Id.*, at 563. Finally, we rejected as too attenuated the Government's argument that firearm possession in school zones could result in violent crime which in turn could

adversely affect the national economy. *Id.*, at 563–567. The Constitution, we said, does not tolerate reasoning that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.*, at 567. Later in *Morrison*, *supra*, we relied on the same four considerations to hold that § 40302 of the Violence Against Women Act of 1994, 108 Stat. 1941, 42 U. S. C. § 13981, exceeded Congress' authority under the Commerce Clause.

In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.

II

A

What is the relevant conduct subject to Commerce Clause analysis in this case? The Court takes its cues from Congress, applying the above considerations to the activity regulated by the Controlled Substances Act (CSA) in general. The Court's decision rests on two facts about the CSA: (1) Congress chose to enact a single statute providing a comprehensive prohibition on the production, distribution, and possession of all controlled substances, and (2) Congress did not distinguish between various forms of intrastate noncommercial cultivation, possession, and use of marijuana. See 21 U. S. C. §§ 841(a)(1), 844(a). Today's decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way, *i. e.*, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun-Free School Zones Act of 1990 was a "brief, single-subject statute," *ante*, at 23,

whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances,'" *ante,* at 24. Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part.

Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," 514 U. S., at 561, the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. *Ante,* at 24–25. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. Furthermore, today's decision suggests we would readily sustain a congressional decision to attach the regulation of intrastate activity to a pre-existing comprehensive (or even not-so-comprehensive) scheme. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a *new* inter-

state scheme exclusively for the sake of reaching intrastate activity, see *ante*, at 25, n. 34; *ante*, at 38–39 (SCALIA, J., concurring in judgment).

I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. Until today, such arguments have been made only in dissent. See *Morrison*, 529 U. S., at 657 (BREYER, J., dissenting) (given that Congress can regulate "'an essential part of a larger regulation of economic activity,'" "can Congress save the present law by including it, or much of it, in a broader 'Safe Transport' or 'Worker Safety' act?"). *Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires, see *Lopez*, 514 U. S., at 557; *id.*, at 578 (KENNEDY, J., concurring), as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

The hard work for courts, then, is to identify objective markers for confining the analysis in Commerce Clause cases. Here, respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce. See *Maryland* v. *Wirtz*, 392 U. S. 183, 193 (1968); *Wickard*, 317 U. S., at 127–128. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the

terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated. See generally *Lopez*, 514 U. S., at 567; *id.*, at 579 (KENNEDY, J., concurring).

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation—including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation—recognize that medical and nonmedical (*i. e.*, recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. See 21 U. S. C. §812; Cal. Health & Safety Code Ann. §11362.5 (West Supp. 2005); *ante*, at 5 (opinion of the Court). Respondents challenge only the application of the CSA to medicinal use of marijuana. Cf. *United States* v. *Raines*, 362 U. S. 17, 20–22 (1960) (describing our preference for as-applied rather than facial challenges). Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." *Lopez*, *supra*, at 583 (KENNEDY, J., concurring); see also *Morrison*, *supra*, at 617–619; *Lopez*, *supra*, at 580 (KENNEDY, J., concurring) ("The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required"); cf. *Garcia*, 469 U. S., at 586 (O'CONNOR, J., dissenting) ("[S]tate autonomy is a relevant factor in assessing the means by which Congress exercises its powers" under the Commerce Clause). California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

B

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court's opinion—the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates, see *Lopez*, *supra*, at 565 ("depending on the level of generality, any activity can be looked upon as commercial")—the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between "what is national and what is local," *Jones & Laughlin Steel*, 301 U. S., at 37. It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care

substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power. *Lopez*, *supra*, at 564.

In *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. See *Morrison*, 529 U. S., at 611, n. 4 (intrastate activities that have been within Congress' power to regulate have been "of an apparent commercial character"); *Lopez*, 514 U. S., at 561 (distinguishing the Gun-Free School Zones Act of 1990 from "activities that arise out of or are connected with a commercial transaction"). The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) *Lopez* makes clear that possession is not itself commercial activity. *Ibid.* And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value. Cf. *id.*, at 583 (KENNEDY, J., concurring) ("The statute now before us forecloses the States from experimenting . . . and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term").

The Court suggests that *Wickard*, which we have identified as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, *supra*, at 560, established federal regulatory power over any home consumption of a commodity for which a national market ex-

ists. I disagree. *Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. 317 U. S., at 115–116. The AAA itself confirmed that Congress made an explicit choice not to reach—and thus the Court could not possibly have approved of federal control over—small-scale, noncommercial wheat farming. In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. *Id.*, at 130, n. 30. *Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. This is not to say that Congress may never regulate small quantities of commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that *Wickard* did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (*i. e.*, whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis signifi-

cantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. *Garcia*, 469 U. S., at 585 (O'CONNOR, J., dissenting) ("It is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution"). As JUSTICE SCALIA recognizes, see *ante*, at 39 (opinion concurring in judgment), Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. Cf. *Printz* v. *United States*, 521 U. S. 898, 923 (1997) (the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action"). Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation, *ante*, at 40 (SCALIA, J., concurring in judgment), recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act of 1990. (According to the Court's and the concurrence's logic, for example, the *Lopez* Court should have reasoned that the prohibition on gun possession in school zones could be an appropriate means of effectuating a related prohibition on "sell[ing]" or "deliver-[ing]" firearms or ammunition to "any individual who the licensee knows or has reasonable cause to believe is less than

eighteen years of age." 18 U. S. C. §922(b)(1) (1988 ed., Supp. II).)

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not "visible to the naked eye." See *Lopez*, 514 U. S., at 563. And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial.

In this regard, again, this case is readily distinguishable from *Wickard*. To decide whether the Secretary could regulate local wheat farming, the Court looked to "the actual effects of the activity in question upon interstate commerce." 317 U. S., at 120. Critically, the Court was able to consider "actual effects" because the parties had "stipulated a summary of the economics of the wheat industry." *Id.*, at 125. After reviewing in detail the picture of the industry provided in that summary, the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent. *Id.*, at 127. With real numbers at hand, the *Wickard* Court could easily conclude that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" nationwide. *Id.*, at 128; see also *id.*, at 128–129 ("This record leaves us in no doubt" about substantial effects).

The Court recognizes that "the record in the *Wickard* case itself established the causal connection between the produc-

tion for local use and the national market" and argues that "we have before us findings by Congress *to the same effect.*" *Ante*, at 20 (emphasis added). The Court refers to a series of declarations in the introduction to the CSA saying that (1) local distribution and possession of controlled substances causes "swelling" in interstate traffic; (2) local production and distribution cannot be distinguished from interstate production and distribution; (3) federal control over intrastate incidents "is essential to the effective control" over interstate drug trafficking. 21 U. S. C. §§ 801(1)–(6). These bare declarations cannot be compared to the record before the Court in *Wickard*.

They amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute. They are asserted without any supporting evidence—descriptive, statistical, or otherwise. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 311 (1981) (REHNQUIST, J., concurring in judgment). Indeed, if declarations like these suffice to justify federal regulation, and if the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way. In that case, Congress had supplied numerous findings regarding the impact gender-motivated violence had on the national economy. 529 U. S., at 614; *id.*, at 628–636 (SOUTER, J., dissenting) (chronicling findings). But, recognizing that "'"[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question,"'" we found Congress' detailed findings inadequate. *Id.*, at 614 (quoting *Lopez*, *supra*, at 557, n. 2, in turn quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 273 (1964) (Black, J., concurring)). If, as the Court claims, today's decision does not

break with precedent, how can it be that voluminous findings, documenting extensive hearings about the specific topic of violence against women, did not pass constitutional muster in *Morrison*, while the CSA's abstract, unsubstantiated, generalized findings about controlled substances do?

In particular, the CSA's introductory declarations are too vague and unspecific to demonstrate that the federal statutory scheme will be undermined if Congress cannot exert power over individuals like respondents. The declarations are not even specific to marijuana. (Facts about substantial effects may be developed in litigation to compensate for the inadequacy of Congress' findings; in part because this case comes to us from the grant of a preliminary injunction, there has been no such development.) Because here California, like other States, has carved out a limited class of activity for distinct regulation, the inadequacy of the CSA's findings is especially glaring. The California Compassionate Use Act exempts from other state drug laws patients and their caregivers "who posses[s] or cultivat[e] marijuana for the *personal* medical purposes of the patient upon the written or oral recommendation or approval of a physician" to treat a list of serious medical conditions. Cal. Health & Safety Code Ann. §§ 11362.5(d), 11362.7(h) (West Supp. 2005) (emphasis added). Compare *ibid.* with, *e. g.*, § 11357(b) (West 1991) (criminalizing marijuana possession in excess of 28.5 grams); § 11358 (criminalizing marijuana cultivation). The Act specifies that it should not be construed to supersede legislation prohibiting persons from engaging in acts dangerous to others, or to condone the diversion of marijuana for nonmedical purposes. § 11362.5(b)(2) (West Supp. 2005). To promote the Act's operation and to facilitate law enforcement, California recently enacted an identification card system for qualified patients. §§ 11362.7–11362.83. We generally assume States enforce their laws, see *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988), and have no reason to think otherwise here.

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way. The Government does cite one estimate that there were over 100,000 Compassionate Use Act users in California in 2004, Reply Brief for Petitioners 16, but does not explain, in terms of proportions, what their presence means for the national illicit drug market. See generally *Wirtz*, 392 U. S., at 196, n. 27 (Congress cannot use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"); cf. General Accounting Office, Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes 21–23 (Rep. No. 03–189, Nov. 2002), http://www.gao.gov/new.items/d03189.pdf (as visited June 3, 2005, and available in Clerk of Court's case file) (in four California counties before the identification card system was enacted, voluntarily registered medical marijuana patients were less than 0.5 percent of the population; in Alaska, Hawaii, and Oregon, statewide medical marijuana registrants represented less than 0.05 percent of the States' populations). It also provides anecdotal evidence about the CSA's enforcement. See Reply Brief for Petitioners 17–18. The Court also offers some arguments about the effect of the Compassionate Use Act on the national market. It says that the California statute might be vulnerable to exploitation by unscrupulous physicians, that Compassionate Use Act patients may overproduce, and that the history of the narcotics trade shows the difficulty of cordoning off any drug use from the rest of the market. These arguments are plausible; if borne out in fact they could justify prosecuting Compassionate Use Act patients under the federal CSA. But, without substantiation,

they add little to the CSA's conclusory statements about diversion, essentiality, and market effect. Piling assertion upon assertion does not, in my view, satisfy the substantiality test of *Lopez* and *Morrison*.

III

We would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty to the people of New York: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961).

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

JUSTICE THOMAS, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can reg-

ulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

I

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." U. S. Const., Art. I, § 8, cl. 3. By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Art. I, § 8, cl. 18. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

A

As I explained at length in *United States* v. *Lopez*, 514 U. S. 549 (1995), the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. *Id.*, at 586–589 (concurring opinion). The Clause's text, structure, and history all indicate that, at the time of the founding, the term "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Id.*, at 585 (THOMAS, J., concurring). Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. *Id.*, at 586–587 (THOMAS, J., concurring). Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange. *Ibid.* (THOMAS,

J., concurring); Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101, 112–125 (2001). The term "commerce" commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 Ark. L. Rev. 847, 857–862 (2003).

Even the majority does not argue that respondents' conduct is itself "Commerce among the several States," Art. I, §8, cl. 3. *Ante*, at 22. Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the Controlled Substances Act (CSA), 21 U. S. C. §801 *et seq.*, regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and selling of marijuana. Instead, it bans the entire market—intrastate or interstate, noncommercial or commercial—for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial.

B

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. Art. I, §8, cl. 18. The Necessary

and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power.[1] Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.[2]

In *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), this Court, speaking through Chief Justice Marshall, set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*, at 421.

To act under the Necessary and Proper Clause, then, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." *Ibid.*; D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, pp. 163–164 (1985). The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause.

1

Congress has exercised its power over interstate commerce to criminalize trafficking in marijuana across state

---

[1] *McCulloch* v. *Maryland*, 4 Wheat. 316, 419–421 (1819); Madison, The Bank Bill, House of Representatives (Feb. 2, 1791), in 3 The Founders' Constitution 244 (P. Kurland & R. Lerner eds. 1987) (requiring "direct" rather than "remote" means-end fit); Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), in *id.*, at 248, 250 (requiring "obvious" means-end fit, where the end was "clearly comprehended within any of the specified powers" of Congress).

[2] *McCulloch*, *supra*, at 413–415; D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 162 (1985).

lines. The Government contends that banning Monson and Raich's intrastate drug activity is "necessary and proper for carrying into Execution" its regulation of interstate drug trafficking. Art. I, §8, cl. 18. See 21 U. S. C. §801(6). However, in order to be "necessary," the intrastate ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." Brief for Petitioners 14; see *ante*, at 22 (majority opinion) (employing rational-basis review). It must be "plainly adapted" to regulating interstate marijuana trafficking—in other words, there must be an "obvious, simple, and direct relation" between the intrastate ban and the regulation of interstate commerce. *Sabri* v. *United States*, 541 U. S. 600, 613 (2004) (THOMAS, J., concurring in judgment); see also *United States* v. *Dewitt*, 9 Wall. 41, 44 (1870) (finding ban on intrastate sale of lighting oils not "appropriate and plainly adapted means for carrying into execution" Congress' taxing power).

On its face, a ban on the intrastate cultivation, possession, and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. *Ante*, at 12–13, 22 (majority opinion). But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is "necessary and proper" as applied to medical marijuana users like respondents.[3]

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that

---

[3] Because respondents do not challenge on its face the CSA's ban on marijuana, 21 U. S. C. §§841(a)(1), 844(a), our adjudication of their as-applied challenge casts no doubt on this Court's practice in *United States* v. *Lopez*, 514 U. S. 549 (1995), and *United States* v. *Morrison*, 529 U. S. 598 (2000). In those cases, we held that Congress, in enacting the statutes at issue, had exceeded its Article I powers.

Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban. *Ante*, at 47–48 (O'CONNOR, J., dissenting). The Court of Appeals found that respondents' "limited use is clearly distinct from the broader illicit drug market," because "th[eir] medicinal marijuana . . . is not intended for, nor does it enter, the stream of commerce." *Raich* v. *Ashcroft*, 352 F. 3d 1222, 1228 (CA9 2003). If that is generally true of individuals who grow and use marijuana for medical purposes under state law, then even assuming Congress has "obvious" and "plain" reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California's Compassionate Use Act sets respondents' conduct apart from other intrastate producers and users of marijuana. The Act channels marijuana use to "seriously ill Californians," Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A) (West Supp. 2005), and prohibits "the diversion of marijuana for nonmedical purposes," § 11362.5(b)(2).[4] California strictly controls the cultivation and possession of marijuana for medical purposes. To be eligible for its program, California requires that a patient have an illness that cannabis can relieve, such as cancer, AIDS, or arthritis, § 11362.5(b)(1)(A), and that he obtain a physician's recommendation or approval, § 11362.5(d). Qualified patients must provide personal and medical information to obtain medical identification cards, and there is a statewide registry of cardholders. §§ 11362.715–11362.76. Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines.

[4] Other States likewise prohibit diversion of marijuana for nonmedical purposes. See, *e. g.*, Colo. Const., Art. XVIII, § 14(2)(d); Nev. Rev. Stat. §§ 453A.300(1)(e)–(f) (2003); Ore. Rev. Stat. §§ 475.316(1)(c)–(d) (2003).

See, *e. g.*, *People* v. *Spark*, 121 Cal. App. 4th 259, 263, 16 Cal. Rptr. 3d 840, 843 (2004).

This class of intrastate users is therefore distinguishable from others. We normally presume that States enforce their own laws, *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988), and there is no reason to depart from that presumption here: Nothing suggests that California's controls are ineffective. The scant evidence that exists suggests that few people—the vast majority of whom are aged 40 or older—register to use medical marijuana. General Accounting Office, Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes 22–23 (Rep. No. 03–189, Nov. 2002), http://www.gao.gov/new.items/d03189.pdf (all Internet materials as visited June 3, 2005, and available in Clerk of Court's case file). In part because of the low incidence of medical marijuana use, many law enforcement officials report that the introduction of medical marijuana laws has not affected their law enforcement efforts. *Id.*, at 32.

These controls belie the Government's assertion that placing medical marijuana outside the CSA's reach "would prevent effective enforcement of the interstate ban on drug trafficking." Brief for Petitioners 33. Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. Only now, a qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers. In the event that a qualified patient is arrested for possession or his cannabis is seized, he could seek to prove as an affirmative defense that, in conformity with state law, he possessed or cultivated small quantities of marijuana intrastate solely for personal medical use. *People* v. *Mower*, 28 Cal. 4th 457, 469–470, 49 P. 3d 1067, 1073–1075 (2002); *People* v. *Trippet*, 56 Cal. App. 4th 1532, 1549, 66 Cal. Rptr. 2d 559, 560 (1997). Moreover, under the CSA, certain drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use—drugs like mor-

phine and amphetamines—are available by prescription. 21 U. S. C. §§ 812(b)(2)(A)–(B); 21 CFR § 1308.12 (2004). No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions.

But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multibillion-dollar interstate market for marijuana. Executive Office of the President, Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb. 2004), http://www.whitehousedrugpolicy.gov/publications/factsht/marijuana/index.html. It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market.

To be sure, Congress declared that state policy would disrupt federal law enforcement. It believed the across-the-board ban essential to policing interstate drug trafficking. 21 U. S. C. § 801(6). But as JUSTICE O'CONNOR points out, Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power. *Ante*, at 53–55 (dissenting opinion). Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.

2

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is

also "proper." The means selected by Congress to regulate interstate commerce cannot be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution. *McCulloch*, 4 Wheat., at 421.

In *Lopez*, I argued that allowing Congress to regulate intrastate, noncommercial activity under the Commerce Clause would confer on Congress a general "police power" over the Nation. 514 U. S., at 584, 600 (concurring opinion). This is no less the case if Congress ties its power to the Necessary and Proper Clause rather than the Commerce Clause. When agents from the Drug Enforcement Administration raided Monson's home, they seized six cannabis plants. If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits. Whether Congress aims at the possession of drugs, guns, or any number of other items, it may continue to "appropriat[e] state police powers under the guise of regulating commerce." *United States* v. *Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring).

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, see *Dewitt*, 9 Wall., at 44; but see Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 186 (2003) (detailing statements by Founders that the Necessary and Proper Clause was not intended to expand the scope of Congress' enumerated powers), Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty. *Printz* v. *United States*, 521 U. S. 898, 923–924 (1997); *Alden* v. *Maine*, 527 U. S. 706, 732–733 (1999); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 585 (1985) (O'CONNOR, J., dissenting); The Federalist No. 33, pp. 204–205 (J. Cooke ed. 1961) (A. Hamilton) (hereinafter The Federalist).

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.[5] *Brecht* v. *Abrahamson*, 507 U. S. 619, 635 (1993); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 719 (1985). Further, the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers. See Brief for Petitioners 21–22; cf. Ehrlich, The Increasing Federalization of Crime, 32 Ariz. St. L. J. 825, 826, 841 (2000) (describing both the relative recency of a large percentage of federal crimes and the lack of a relationship between some of these crimes and interstate commerce). This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext . . . for the accomplishment of objects not intrusted to the government." *McCulloch*, *supra*, at 423.

---

[5] In fact, the Anti-Federalists objected that the Necessary and Proper Clause would allow Congress, *inter alia*, to "*constitute new Crimes*, . . . and extend [its] Power as far as [it] shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights." Mason, Objections to the Constitution Formed by the Convention (1787), in 2 The Complete Anti-Federalist 11, 12–13 (H. Storing ed. 1981) (emphasis added). Hamilton responded that these objections were gross "misrepresentation[s]." The Federalist No. 33, at 204. He termed the Clause "perfectly harmless," for it merely confirmed Congress' implied authority to enact laws in exercising its enumerated powers. *Id.*, at 205; see also *Lopez*, 514 U. S., at 597, n. 6 (THOMAS, J., concurring) (discussing Congress' limited ability to establish nationwide criminal prohibitions); *Cohens* v. *Virginia*, 6 Wheat. 264, 426–428 (1821) (finding it "clear, that Congress cannot punish felonies generally," except in areas over which it possesses plenary power). According to Hamilton, the Clause was needed only "to guard against cavilling refinements" by those seeking to cripple federal power. The Federalist No. 33, at 205; *id.*, No. 44, at 303–304 (J. Madison).

II

The majority advances three reasons why the CSA is a legitimate exercise of Congress' authority under the Commerce Clause: First, respondents' conduct, taken in the aggregate, may substantially affect interstate commerce, *ante*, at 22; second, regulation of respondents' conduct is essential to regulating the interstate marijuana market, *ante*, at 24–25; and, third, regulation of respondents' conduct is incidental to regulating the interstate marijuana market, *ante*, at 22. JUSTICE O'CONNOR explains why the majority's reasons cannot be reconciled with our recent Commerce Clause jurisprudence. The majority's justifications, however, suffer from even more fundamental flaws.

A

The majority holds that Congress may regulate intrastate cultivation and possession of medical marijuana under the Commerce Clause, because such conduct arguably has a substantial effect on interstate commerce. The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design. *Morrison*, *supra*, at 627 (THOMAS, J., concurring).

The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce, any more than activities that do not fall within, but that affect, the subjects of its other Article I powers. *Lopez*, 514 U. S., at 589 (THOMAS, J., concurring). Whatever additional latitude the Necessary and Proper Clause affords, *supra*, at 65–66, the question is whether Congress' legislation is essential to the regulation of interstate commerce itself—not whether the legislation extends only to economic

activities that substantially affect interstate commerce. *Supra*, at 60–61; *ante*, at 37. (SCALIA, J., concurring in judgment).

The majority's treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market. *Supra*, at 64. The majority ignores that whether a particular activity substantially affects interstate commerce—and thus comes within Congress' reach on the majority's approach—can turn on a number of objective factors, like state action or features of the regulated activity itself. *Ante*, at 47–48 (O'CONNOR, J., dissenting). For instance, here, if California and other States are effectively regulating medical marijuana users, then these users have little effect on the interstate drug trade.[6]

The substantial effects test is easily manipulated for another reason. This Court has never held that Congress can

---

[6] Remarkably, the majority goes so far as to declare this question irrelevant. It asserts that the CSA is constitutional even if California's current controls are effective, because state action can neither expand nor contract Congress' powers. *Ante*, at 29–30, n. 38. The majority's assertion is misleading. Regardless of state action, Congress has the power to regulate intrastate economic activities that substantially affect interstate commerce (on the majority's view) or activities that are necessary and proper to effectuating its commerce power (on my view). But on either approach, whether an intrastate activity falls within the scope of Congress' powers turns on factors that the majority is unwilling to confront. The majority apparently believes that even if States prevented any medical marijuana from entering the illicit drug market, and thus even if there were no need for the CSA to govern medical marijuana users, we should uphold the CSA under the *Commerce* Clause and the *Necessary* and Proper Clause. Finally, to invoke the Supremacy Clause, as the majority does, *ante*, at 29, n. 38, is to beg the question. The CSA displaces California's Compassionate Use Act if the CSA is constitutional as applied to respondents' conduct, but that is the very question at issue.

regulate noneconomic activity that substantially affects interstate commerce. *Morrison*, 529 U. S., at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is *economic* in nature" (emphasis added)); *Lopez*, *supra*, at 560. To evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms as "'the production, distribution, and consumption of commodities.'"[7] *Ante*, at 25 (quoting Webster's Third New International Dictionary 720 (1966) (hereinafter Webster's 3d)). This carves out a vast swath of activities that are subject to federal regulation. See *ante*, at 49–50 (O'CONNOR, J., dissenting). If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite." The Federalist No. 45, at 313.

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term.[8] The majority's opinion

---

[7] Other dictionaries do not define the term "economic" as broadly as the majority does. See, *e. g.*, The American Heritage Dictionary of the English Language 583 (3d ed. 1992) (defining "economic" as "[o]f or relating to the production, development, and management of *material wealth*, as of a country, household, or business enterprise" (emphasis added)). The majority does not explain why it selects a remarkably expansive 40-year-old definition.

[8] See, *e. g.*, *id.*, at 380 ("[t]he buying and selling of goods, especially on a large scale, as between cities or nations"); The Random House Dictionary of the English Language 411 (2d ed. 1987) ("an interchange of goods or commodities, esp. on a large scale between different countries . . . or be-

only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from "'[c]ommerce,'" *ante*, at 5, to "commercial" and "economic" activity, *ante*, at 23, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established . . . interstate market," *ante*, at 26. Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.

The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. *Ante*, at 18–19; *Lopez*, 514 U. S., at 573–574 (KENNEDY, J., concurring). The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers. *Id.*, at 590–593 (THOMAS, J., concurring); Letter from J. Madison to S. Roane (Sept. 2, 1819), in 3 The Founders' Constitution 259–260 (P. Kurland & R. Lerner eds. 1987). Moreover, the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate *inter*state commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate *intra*state commerce—not to mention a host of local activities, like mere drug possession, that are not commercial.

One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that "'[t]he Constitution created a Federal Government of limited powers.'" *New York* v. *United States*, 505 U. S. 144, 155 (1992) (quoting *Gregory* v. *Ashcroft*,

---

tween different parts of the same country"); Webster's 3d 456 ("the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place").

501 U. S. 452, 457 (1991)). That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce . . . among the several States." Congress may regulate interstate commerce—not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.

B

The majority also inconsistently contends that regulating respondents' conduct is both incidental and essential to a comprehensive legislative scheme. *Ante*, at 22, 24–25. I have already explained why the CSA's ban on local activity is not essential. *Supra*, at 64. However, the majority further claims that, because the CSA covers a great deal of interstate commerce, it "is of no moment" if it also "ensnares some purely intrastate activity." *Ante*, at 22. So long as Congress casts its net broadly over an interstate market, according to the majority, it is free to regulate interstate and intrastate activity alike. This cannot be justified under either the Commerce Clause or the Necessary and Proper Clause. If the activity is purely intrastate, then it may not be regulated under the Commerce Clause. And if the regulation of the intrastate activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause.

Nevertheless, the majority terms this the "pivotal" distinction between the present case and *Lopez* and *Morrison*. *Ante*, at 23. In *Lopez* and *Morrison*, the parties asserted facial challenges, claiming "that a particular statute or provision fell outside Congress' commerce power in its entirety." *Ante*, at 23. Here, by contrast, respondents claim only that the CSA falls outside Congress' commerce power as applied

to their individual conduct. According to the majority, while courts may set aside whole statutes or provisions, they may not "excise individual applications of a concededly valid statutory scheme." *Ibid.*; see also *Perez* v. *United States*, 402 U. S. 146, 154 (1971); *Maryland* v. *Wirtz*, 392 U. S. 183, 192–193 (1968).

It is true that if respondents' conduct is part of a "class of activities . . . and that class is within the reach of federal power," *Perez*, *supra*, at 154 (emphasis deleted), then respondents may not point to the *de minimis* effect of their own personal conduct on the interstate drug market, *Wirtz*, *supra*, at 196, n. 27. *Ante*, at 47 (O'CONNOR, J., dissenting). But that begs the question at issue: whether respondents' "class of activities" is "within the reach of federal power," which depends in turn on whether the class is defined at a low or a high level of generality. *Supra*, at 61–62. If medical marijuana patients like Monson and Raich largely stand outside the interstate drug market, then courts must excise them from the CSA's coverage. Congress expressly provided that if "a provision [of the CSA] is held invalid in one or more of its *applications*, the provision shall remain in effect in all its valid applications that are severable." 21 U. S. C. §901 (emphasis added); see also *United States* v. *Booker*, 543 U. S. 220, 320–321, and n. 9 (2005) (THOMAS, J., dissenting in part).

Even in the absence of an express severability provision, it is implausible that this Court could set aside entire portions of the United States Code as outside Congress' power in *Lopez* and *Morrison*, but it cannot engage in the more restrained practice of invalidating particular applications of the CSA that are beyond Congress' power. This Court has regularly entertained as-applied challenges under constitutional provisions, see *United States* v. *Raines*, 362 U. S. 17, 20–21 (1960), including the Commerce Clause, see *Katzenbach* v. *McClung*, 379 U. S. 294, 295 (1964); *Heart of Atlanta*

Motel, Inc. v. *United States*, 379 U. S. 241, 249 (1964); *Wickard* v. *Filburn*, 317 U. S. 111, 113–114 (1942). There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis. The CSA undoubtedly regulates a great deal of interstate commerce, but that is no license to regulate conduct that is neither interstate nor commercial, however minor or incidental.

If the majority is correct that *Lopez* and *Morrison* are distinct because they were facial challenges to "particular statute[s] or provision[s]," *ante*, at 23, then congressional power turns on the manner in which Congress packages legislation. Under the majority's reasoning, Congress could not enact—either as a single-subject statute or as a separate provision in the CSA—a prohibition on the intrastate possession or cultivation of marijuana. Nor could it enact an intrastate ban simply to supplement existing drug regulations. However, that same prohibition is perfectly constitutional when integrated into a piece of legislation that reaches other regulable conduct. *Lopez*, 514 U. S., at 600–601 (THOMAS, J., concurring).

Finally, the majority's view—that because *some* of the CSA's applications are constitutional, they must *all* be constitutional—undermines its reliance on the substantial effects test. The intrastate conduct swept within a general regulatory scheme may or may not have a substantial effect on the relevant interstate market. "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Id.*, at 600 (THOMAS, J., concurring). The breadth of legislation that Congress enacts says nothing about whether the intrastate activity substantially affects interstate commerce, let alone whether it is necessary to the scheme. Because medical marijuana users in California and elsewhere are not placing substantial amounts of cannabis

into the stream of interstate commerce, Congress may not regulate them under the substantial effects test, no matter how broadly it drafts the CSA.

* * *

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern," *id.*, at 583 (KENNEDY, J., concurring). The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 502 (2001) (STEVENS, J., concurring in judgment). Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Syllabus

ALASKA *v.* UNITED STATES

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 128, Orig. Argued January 10, 2005—Decided June 6, 2005

States are generally entitled "under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands extending three miles seaward of [their] coastline[s]." *United States* v. *Alaska*, 521 U. S. 1, 6 *(Alaska (Arctic Coast))*. The Federal Government can overcome the presumption of title and defeat a future State's claim, however, by setting submerged lands aside before statehood in a way that shows an intent to retain title. *Id.*, at 33–34. Here, Alaska and the United States dispute title to two areas of submerged lands. The first consists of pockets and enclaves of submerged lands underlying waters in the Alexander Archipelago that are more than three nautical miles from the coast of the mainland or any individual island. Alaska can claim these pockets and enclaves only if the archipelago waters themselves qualify as inland waters. The second area consists of submerged lands beneath the inland waters of Glacier Bay, a well-marked indentation into the southeastern Alaskan coast. To claim them, the United States must rebut Alaska's presumption of title. The Special Master recommended that summary judgment be granted to the United States with respect to both areas, concluding that the Alexander Archipelago waters do not qualify as inland waters either under a historic inland waters theory or under a juridical bay theory, and concluding that the United States had rebutted the presumption that title to the disputed submerged lands beneath Glacier Bay passed to Alaska at statehood. Alaska filed exceptions to these conclusions.

Held: Alaska's exceptions are overruled. Pp. 81–110.

(a) The Alexander Archipelago's waters are not historic inland waters. To make a historic waters claim, a State must show that the United States exercises authority over the area, has done so continuously, and has done so with the acquiescence of foreign nations. This "exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation," *United States* v. *Alaska*, 422 U. S. 184, 197, including vessels engaged in "innocent passage," *i. e.*, passage that does not prejudice the coastal State's peace, good order, or security. Based on his examination of five different periods from 1821 to the present, the Special Master found that Russia and the United States historically have not asserted the requisite authority

over the waters of the Alexander Archipelago. The evidence that Alaska points to—including incidents during Russian and early United States sovereignty, and the United States' litigating position during a 1903 arbitration proceeding—is insufficient to demonstrate the continuous assertion of exclusive authority, with acquiescence of foreign nations, necessary to support a historic inland waters claim. Pp. 81–92.

(b) Nor do the Alexander Archipelago's waters qualify as inland waters under the juridical bay theory Alaska advances in the alternative. The claimed juridical bays would exist only if, at minimum, four of the archipelago's islands were deemed to form a constructive peninsula extending from the mainland and dividing the archipelago's waters in two. Yet even assuming, *arguendo*, that each of the islands should be assimilated one to another, Alaska's hypothetical bays still would not meet the criteria for juridical bays set forth in Article 7(2) of the Convention on the Territorial Sea and the Contiguous Zone (hereinafter Convention). In particular, the resulting bodies of water north and south of Alaska's constructive peninsula do not qualify as well-marked indentations under the Convention, for they do not possess physical features that would allow a mariner looking at navigational charts that do not depict bay closing lines nonetheless to perceive the bays' limits in order to avoid illegal encroachment into inland waters. Pp. 92–96.

(c) The United States has rebutted Alaska's presumed title to the submerged lands underlying the waters of Glacier Bay National Monument (now Glacier Bay National Park). The United States can defeat a future State's presumed title to submerged lands by, *inter alia*, setting the lands aside as part of a federal reservation "such as a wildlife refuge." *Idaho* v. *United States*, 533 U. S. 262, 273. To determine whether Congress has used that power, this Court first asks whether the United States clearly intended to include the submerged lands within the reservation. If the answer is yes, the Court then asks whether the United States expressed its intent to retain federal title to the lands within the reservation.

The Special Master's conclusion that the monument, at the time of Alaska's statehood, included the submerged lands underlying Glacier Bay has strong support in the precedents and whole record of the case, and Alaska does not take exception to it. As for the second question, the Alaska Statehood Act's (ASA) provisions suffice to overcome Alaska's ownership presumption arising from the equal-footing doctrine and the Submerged Lands Act (SLA) and to reserve Glacier Bay's submerged lands to the United States.

Under the ASA, Alaska acquired title to any property previously belonging to the Territory of Alaska and the United States retained title to its property located within Alaska's borders, subject to exceptions set

forth in ASA § 6. The first clause of § 6(e) directs a transfer to Alaska of any United States property used "for the sole purpose of conservation and protection of [Alaska's] fisheries and wildlife" under three specified federal laws. The second proviso following that clause made clear that the initial clause's directive did not apply to "lands withdrawn or otherwise set apart as refuges or reservations for [wildlife] protection." In *Alaska (Arctic Coast)*, this Court held that the proviso expressed congressional intent to retain title to a reservation such as the Arctic National Wildlife Refuge, and that intent was sufficient to defeat Alaska's presumed title under both the equal-footing doctrine and the SLA. Alaska cannot avoid that result here.

Alaska's narrow reading—that the proviso applies only to federal property covered by § 6(e)'s initial clause, which does not include Glacier Bay—is neither necessary nor preferred. A proviso may refer only to things covered by a preceding clause, but it can also state a general, independent rule. The Court agrees with the United States that the proviso is best read, in light of the interpretation given to it in *Alaska (Arctic Coast)*, as expressing an independent and general rule uncoupled from the initial clause. Under the initial clause the United States obligated itself to transfer to Alaska equipment and other property used for general fish and wildlife management responsibilities Alaska was to undertake upon acquiring statehood. Under the proviso the United States expressed its intent, notwithstanding this property transfer, to retain ownership over all federal refuges and reservations set aside for the protection of wildlife, regardless of the specific statutory authority enabling the set-aside. This expression of intent encompassed Glacier Bay National Monument, which was set aside "for the protection of wildlife" within the meaning of § 6(e). The text thus defeated the presumption that the new State of Alaska would acquire title to the submerged lands underlying the monument's waters, including the inland waters of Glacier Bay. Pp. 96–110.

Exceptions overruled.

KENNEDY, J., delivered the opinion for a unanimous Court with respect to Parts I, II, III, and IV, the opinion of the Court with respect to Part V, in which STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined, and the opinion of the Court with respect to Part VI, in which STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined, and in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined except as to those portions related to Part V. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 113.

Jonathan S. Franklin argued the cause for plaintiff. With him on the brief were *Gregg D. Renkes*, Attorney General of Alaska, *Joanne M. Grace* and *Laura C. Bottger*, Assistant Attorneys General, and *G. Thomas Koester*.

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Acting Solicitor General Clement*, *Assistant Attorney General Sansonetti*, *Deputy Solicitor General Kneedler*, *Michael W. Reed*, and *Bruce M. Landon*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The State of Alaska has invoked our original jurisdiction to resolve its dispute with the United States over title to certain submerged lands underlying waters located in southeast Alaska. Alaska initiated the action by filing a complaint with leave of the Court. 530 U. S. 1228 (2000). We appointed Professor Gregory E. Maggs to act as Special Master in this matter. 531 U. S. 941 (2000). The Special Master gave thorough consideration to the written and oral submissions of the parties. In a detailed report he now recommends the grant of summary judgment to the United States with respect to all the submerged lands in dispute. Report of Special Master 1 (hereinafter Report or Special Master's Report). We set the case for oral argument on Alaska's exceptions to the Special Master's Report. 543 U. S. 953 (2004). For the reasons we discuss, Alaska's exceptions are overruled.

I

We begin by reviewing the general principles elaborated in the resolution of similar submerged lands disputes in our earlier cases.

States enjoy a presumption of title to submerged lands beneath inland navigable waters within their boundaries and

---

**Louis R. Cohen* filed a brief for the National Parks Conservation Association as *amicus curiae*.

beneath territorial waters within three nautical miles of their coasts. This presumption flows from two sources. Under the established rule known as the equal-footing doctrine, new States enter the Union "on an 'equal footing' with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries." *United States* v. *Alaska*, 521 U. S. 1, 5 (1997) *(Alaska (Arctic Coast))*. Under the Submerged Lands Act (SLA), 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, which applies to Alaska through an express provision of the Alaska Statehood Act (ASA), § 6(m), 72 Stat. 343, the presumption of state title to "lands beneath navigable waters within the boundaries of the respective States" is "confirmed" and "established." 43 U. S. C. § 1311(a); see also *Alaska (Arctic Coast)*, 521 U. S., at 5–6. The SLA also "establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States." *Id.*, at 6. "As a general matter, then, Alaska is entitled under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands extending three miles seaward of its coastline." *Ibid.*

The Federal Government can overcome the presumption and defeat a future State's title to submerged lands by setting them aside before statehood in a way that shows an intent to retain title. *Id.*, at 33–34. The requisite intent must, however, be "'definitely declared or otherwise made very plain.'" *Id.*, at 34 (quoting *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926)).

With these principles in mind, we discuss the two areas of submerged land at issue here.

II

The first area of submerged land in dispute, claimed by Alaska under alternative theories in counts I and II of its

amended complaint to quiet title (hereinafter Amended Complaint), consists of pockets and enclaves of submerged lands underlying waters in between and fringing the southeastern Alaska islands known as the Alexander Archipelago. These disputed submerged lands, shown in red and dark blue on the map in Appendix A, *infra*, share a common feature: All points within the pockets and enclaves are more than three nautical miles from the coast of the mainland or of any individual island of the Alexander Archipelago.

For these pockets and enclaves, the dispositive question is whether the Alexander Archipelago's waters qualify as inland waters. If they do, Alaska's coastline would begin at the outer bounds of these inland waters as marked by the black line drawn on the map in Appendix A, *infra*. See 43 U. S. C. § 1301(c) ("The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters"); see also *United States* v. *Alaska*, 422 U. S. 184, 187–188, and n. 5 (1975) *(Alaska (Cook Inlet))*. Under the equal-footing doctrine and the SLA, a presumption of state title would then arise as to all the submerged lands underlying both the inland waters landward of this coastline, and also the territorial sea within three nautical miles of it. Because the United States concedes it could not rebut the presumption of state title as to this aspect of the case, Alaska would have title to all the pockets and enclaves of submerged lands in dispute.

If the Alexander Archipelago's waters do not qualify as inland, then they instead qualify as territorial sea. In that case Alaska would have no claim of title to the disputed pockets and enclaves, as these lands are beyond three nautical miles from the coast of the mainland or any individual island.

The second area of submerged land in dispute, claimed by Alaska in count IV of its Amended Complaint, consists of the submerged land beneath Glacier Bay, a well-marked indentation into the coast of the southeast Alaskan mainland. See

Appendixes C, D, *infra* (maps of Glacier Bay). There is no question that Glacier Bay's waters are inland. For the submerged lands underlying these waters, the controlling question is whether the United States can rebut Alaska's presumption of title.

After receiving the parties' written submissions and conducting a hearing, the Special Master recommended that this Court grant summary judgment to the United States with respect to Alaska's claims of title to both areas of submerged land in dispute. Report 1. As to the pockets and enclaves, the Special Master concluded that the waters of the Alexander Archipelago do not qualify as inland waters either under the historic inland waters theory advanced in count I of Alaska's Amended Complaint or under the juridical bay theory advanced in count II. *Id.*, at 137–138, 226. As to the submerged lands underlying Glacier Bay and claimed by Alaska in count IV, the Special Master concluded that the United States has rebutted the presumption that title passed to Alaska at statehood. *Id.*, at 276. Alaska filed exceptions to each of these three conclusions. We address them in turn.

III

In count I of its Amended Complaint, Alaska alleges that the waters of the Alexander Archipelago are historic inland waters. As this Court has recognized, "where a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." *Alaska (Arctic Coast)*, *supra*, at 11. "For this showing," we have elaborated, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska (Cook Inlet)*, *supra*, at 197.

Nations may exclude from inland waters even vessels engaged in so-called "innocent passage"—passage that "is not

prejudicial to the peace, good order or security of the coastal State," Arts. 14(1), 14(4) of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U. S. T. 1607, 1610, T. I. A. S. No. 5639 (hereinafter Convention). See *United States* v. *Louisiana*, 470 U. S. 93, 113 (1985) *(Alabama and Mississippi Boundary Case); United States* v. *Louisiana*, 394 U. S. 11, 22 (1969). To claim a body of water as historic inland water, it is therefore important to establish that the right to exclude innocent passage has somehow been asserted, even if never actually exercised. See *Alabama and Mississippi Boundary Case*, 470 U. S., at 113, and n. 13. The Court also has considered the "vital interests of the United States" in designating waters as historic inland waters. *Id.*, at 103.

The Special Master recommended that the Court grant summary judgment to the United States on this count. The Special Master first made a thorough examination of historical documents, from 1821 to the present, bearing on the status of the Alexander Archipelago's waters. The Special Master sorted these documents into five distinct periods: (1) Russian sovereignty (1821–1867), Report 23–38; (2) early American sovereignty (1867–1903), *id.*, at 38–55; (3) the 1903 U. S.-Britain Boundary Arbitration, *id.*, at 56–63; (4) later American sovereignty (1903–1959), *id.*, at 63–89; and (5) the poststatehood era (1959–present), *id.*, at 89–107. Based on his examination of the record evidence from all of these periods, the Special Master concluded that "Russia and the United States historically did not assert authority to exclude vessels from making innocent passage through the waters of the Alexander Archipelago." *Id.*, at 109. In the Special Master's view, Alaska had at best "uncovered and presented only 'questionable evidence' that the United States exercised the kind of authority over the waters of the Archipelago that would be necessary to prove a historic waters claim." *Id.*, at 129.

Though Alaska's failure to demonstrate that the waters of the Alexander Archipelago had historically been treated as inland waters would by itself justify granting summary judgment to the United States on count I, the Special Master also addressed other relevant factors, such as the acquiescence of other nations and the vital interests of the United States. In the Special Master's view these factors only strengthened the case for granting summary judgment to the United States.

Excepting to the Special Master's recommendation on count I, Alaska contends the Special Master gave too little weight to historical events that tend to support Alaska's position. By the same token Alaska argues the Special Master gave too much weight to historical events that tend to undermine its position. Alaska also asserts that foreign nations have acquiesced in the treatment of the waters of the Alexander Archipelago as inland waters, and that the interests of the United States support such treatment. We find Alaska's arguments unconvincing.

Rather than canvassing the entire historical record discussed by the Special Master in his thorough, commendable report, we turn our attention to the events Alaska presents as its best evidence that the Alexander Archipelago's waters qualify as historic inland waters.

A

First in time among the events to which Alaska points are incidents from the period of Russian sovereignty. These incidents are pertinent to the inquiry because, as we have held, when Russia ceded the territory of Alaska to the United States in 1867, "the United States thereby acquired whatever dominion Russia had possessed." *Alaska (Cook Inlet)*, 422 U. S., at 192, n. 13.

In 1824, the United States and Russia entered into a treaty that, *inter alia*, granted United States vessels the right, over

the next 10 years, to "frequent, without any hindrance whatever, the interior seas, gulphs, harbours, and creeks [of the Alexander Archipelago], for the purpose of fishing and trading with the natives of the country." See Convention Between the United States of America and Russia, Art. 4, 8 Stat. 304 (1825) (hereinafter 1824 Treaty or Treaty). In Alaska's view this Treaty demonstrates that "the Russian claim extended to the entire Archipelago" and thus that Russia treated the archipelago waters as inland waters. Exceptions to Report of Special Master and Brief in Support for Plaintiff 29 (hereinafter Exceptions and Brief for Plaintiff Alaska). The principal problem with Alaska's assertion is that the 1824 Treaty by its terms did not address navigation for the purpose of innocent passage, but rather addressed only navigation "for the purpose of fishing and trading with the natives." Even on the questionable assumption that the Treaty's reference to "interior seas" included all the waters of the Alexander Archipelago and not just waters within three nautical miles of the coast of the mainland or any particular island, but see Report 27–28 (refuting this assumption), the Treaty simply does not provide evidence that Russia asserted a right to exclude innocent passage. Yet evidence of the assertion of this right—not some lesser right—must be provided to support a historic inland waters claim. See *Alaska (Cook Inlet)*, *supra*, at 197.

Upon the expiration of the 10-year right granted to United States vessels by virtue of the 1824 Treaty, Russia stationed a brig, the *Chichagoff*, at the southern border of Russian America. Alaska implies that Russia's purpose in stationing the brig there was to exclude any foreign vessels from entering the Alexander Archipelago's waters. See Exceptions and Brief for Plaintiff Alaska 30–31. Were we to accept this interpretation of the *Chichagoff* incident, we would acknowledge it as some evidence that Russia treated the Alexander Archipelago's waters as inland waters.

As the Special Master noted, however, a report prepared for the 1903 Alaskan Boundary Tribunal (a tribunal we will discuss further) described the *Chichagoff* incident as follows:

> "Governor Wrangell sent the brig *Chichagoff*, under command of Lieutenant Zarembo, to Tongas, near the southern boundary line at 54° 40′, for the purpose of intercepting foreign vessels entering the inland waters of the colony, to the masters of which he was to deliver written notice of the expiration of the treaty provisions, being furnished with six copies for American and three for British vessels." 1 Proceedings of the Alaskan Boundary Tribunal, S. Doc. No. 162, 58th Cong., 2d Sess., pt. 2, p. 70 (1904) (hereinafter ABT Proceedings) (footnote omitted).

Like the Special Master, we see nothing in this passage to indicate that Russia, through its actions with respect to the *Chichagoff*, asserted a right to exclude from the Alexander Archipelago waters foreign vessels engaged only in innocent passage. By giving written notice of the expiration of the 1824 Treaty rights, the *Chichagoff* reminded American mariners that they were no longer free to trade with the natives, or to approach within cannon shot of the Russian lands "without any hindrance whatever." 1824 Treaty, Art. 4, 8 Stat. 304. Russia did not assert thereby the more sweeping right to exclude even vessels engaged only in innocent passage.

Alaska also points to evidence that in 1836 Russian forces apprehended and boarded the American vessel *Loriot* while it was within the Alexander Archipelago waters, and then ordered it "'to leave the waters of His Imperial Majesty.'" Exceptions and Brief for Plaintiff Alaska 30; see also Letter from John Forsyth to G. M. Dallas (May 4, 1837), reprinted in Report of Secretary of State Thomas F. Bayard upon the Seal Fisheries in the Bering Sea, S. Exec. Doc. No. 106, 50th Cong., 2d Sess., 232–233 (1889). Even this incident does not

constitute evidence that Russia viewed the archipelago waters as inland waters, however, because the *Loriot* was not engaged in innocent passage. The *Loriot*'s mission, as freely admitted in a contemporary letter written by a State Department official to a member of the United States legation in St. Petersburg, was to visit "the northwest coast of America, for the purpose of procuring provisions, and also Indians to hunt for sea otter on the said coast." *Id.*, at 232. By excluding the *Loriot*, which evidently had tried to exceed the limits of mere "innocent passage," Russia did not, and could not, assert a right to exclude vessels engaged solely in innocent passage.

In sum, none of the incidents Alaska cites from the period of Russian sovereignty support the proposition that Russia treated the waters of the Alexander Archipelago as inland waters prior to ceding Alaska to the United States in 1867.

B

For the period of early U. S. sovereignty between 1867 and 1903, Alaska cites not a single incident demonstrating that the United States acted in a manner consistent with an understanding that the Alexander Archipelago waters were inland. Alaska thus leaves itself with at most 56 years to demonstrate continuous prestatehood treatment of the Alexander Archipelago as inland waters. This alone constitutes a substantial weakness in Alaska's position.

As to the years between 1867 and 1903, Alaska does attempt to explain away a significant event which undercuts its claim, but this attempt is unsuccessful. In 1886, Secretary of State Thomas F. Bayard wrote a letter to Secretary of Treasury Daniel Manning concerning the limits of the territorial waters of the United States on both the northeastern and the northwestern coasts. See 1 J. Moore, Digest of International Law 718–721 (1906). The State Department's position with respect to waters surrounding fringing islands on both coasts was that the sovereigns of those islands could

only claim a territorial sea of three miles from the coast of each island. Secretary Bayard explained that, in asserting the 3-mile belt of territorial sea, the United States denied neither "the free right of vessels of other nations to pass, on peaceful errands, through this zone" nor the right "of relief, when suffering from want of necessaries, from the shore." *Id.*, at 720–721 (internal quotation marks omitted).

According to Secretary Bayard, the State Department's position was a well-considered one, rooted in principles of reciprocity and consistent practice:

> "These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the British sceptre. We can not refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them . . . against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase." *Id.*, at 721 (internal quotation marks omitted).

The Special Master singled out this letter as "unambiguously support[ing] the United States' position that the United States and Russia historically did not assert the right to exclude foreign vessels from the waters of the Archipelago." Report 109. Emphasizing the statements in the letter that the United States could not "'claim greater jurisdiction'" than three miles of marginal seas and that foreign vessels had the right to make "'free transit,'" the Special Master concluded that "[o]fficials who held this belief could not, and evidently did not, claim that the United States could exclude innocent passage through the waters." *Id.*, at 110.

Alaska argues that Secretary Bayard's letter is of minimal relevance because "it was internal correspondence that primarily addressed a dispute on the East coast" and thus "did not announce to any foreign nation that the United States

had abandoned a claim to the Archipelago." Exceptions and Brief for Plaintiff Alaska 31–32. Alaska's arguments are unpersuasive. That Secretary Bayard's letter referred to the east coast in no way diminishes the unequivocal nature of its statements with respect to the Alaskan coast. It may be true that no foreign nation ever became aware of Secretary Bayard's letter (though the subsequent publication of the letter in the United States' Digest of International Law gives us reason to believe the contrary). Regardless, Secretary Bayard's letter still provides strong evidence that the United States, as of 1886, did not claim a right to exclude all foreign vessels from the Alexander Archipelago waters and had no intention of doing so. We do not need to parse the letter to see whether it "announce[d] to any foreign nation that the United States had abandoned a claim to the Archipelago," for Alaska can muster no proof that the United States as of 1886 had made any such claim in the first place.

C

A stronger piece of evidence Alaska identifies to support its historic inland waters claim is a litigating position taken by the United States during an arbitration proceeding in 1903. This proceeding was before the Alaskan Boundary Tribunal, a body convened to resolve a dispute between the United States and Britain regarding the land boundary between southeastern Alaska and Canada. Report 56–63, 116–119.

In a written submission to the tribunal, the United States described its view of the "political coast" of Alaska as enclosing all of the Alexander Archipelago waters, as shown on the map in Appendix A, *infra*. 4 ABT Proceedings, pt. 1, pp. 31–32 (1903). According to the United States' submissions, "[t]he boundary of Alaska,—that is, the exterior boundary from which the marine league [of the territorial sea] is measured,—runs along the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of

hundreds of islands." 5 *id.*, pt. 1, at 15–16. At oral argument before the tribunal, moreover, counsel for the United States made explicit that the recognition of such a "political coast" would render all waters landward of it "just as much interior waters as the interior waters of Loch Lomond." 7 *id.*, at 611 (1904).

Before the Special Master in the instant case, the United States sought to discount as mere hypothetical statements the submissions it had made at the tribunal a full century prior. The Special Master rejected this view and instead agreed with Alaska that in its submissions to the tribunal the United States "was expressing a considered analysis of the [Alexander Archipelago] area, not merely speaking hypothetically for the purpose of showing a flaw in Britain's argument." Report 61. Ultimately, however, the Special Master still concluded that the United States' submissions to the tribunal were "not an adequate assertion of authority over the waters of the Alexander Archipelago." *Id.*, at 118. The Special Master noted that the issue before the 1903 tribunal was not "[t]he status of the waters of the Alexander Archipelago," *ibid.*, but rather the land boundary between southeast Alaska and Canada; that the United States' declarations regarding the status of the Alexander Archipelago took up "only a few paragraphs in a seven volume record"; and that "[f]or these reasons, it would be unrealistic to conclude that counsel's assertions at the tribunal should have made foreign nations (other than Britain) aware that the United States was asserting a right to exclude them," *ibid.*

Alaska responds that the Special Master was incorrect to conclude that the United States' submissions in 1903 could not have made foreign nations other than Britain aware of its claim. Alaska argues that Norway became aware of the United States' submissions and then relied on them in its dispute with the United Kingdom in the well-known *Fisheries Case (U. K. v. Nor.)*, 1951 I. C. J. 116 (Judgment of Dec. 18). As the Special Master explained, however, "[t]he abil-

ity of one foreign nation to discover the United States' argument when litigating a related issue . . . does not mean that foreign nations should have known of the United States' position." Report 118, n. 34. This reasoning carries particular force in light of the precedent a contrary conclusion would create. If this Court were to recognize historic inland waters claims based on arguments made by counsel during litigation about nonmaritime boundaries, "the United States would itself become vulnerable to similarly weak claims by other nations that would restrict the freedom of the seas." Reply Brief for United States in Response to Exceptions of the State of Alaska 15–16 (hereinafter Reply Brief for United States). We are reluctant to create a precedent that would have this effect.

D

The litigating position taken by the United States at the ABT Proceedings at best would provide weak support for inland status of the Alexander Archipelago waters even were we to accept it as signaling a significant change from the view expressed in Secretary Bayard's letter of 1886; for there is little evidence that the United States later acted in a manner consistent with this litigating position. Alaska says that the United States asserted control over the waters by enacting and enforcing fishery regulations in the Alexander Archipelago during the first half of the 20th century. Exceptions and Brief for Plaintiff Alaska 25–29. In particular, Alaska cites the 1906 Alien Fishing Act, 34 Stat. 263, which prohibited foreign, but not domestic, commercial fishing "in any of the waters of Alaska." As its sole evidence that the Act was enforced even in the pockets and enclaves at issue, Alaska cites the seizure by the United States Coast Guard in 1924 of the Canadian vessel *Marguerite*, whose captain was fined $100 for fishing in contravention of the Act.

Assuming, *arguendo*, that the *Marguerite* was seized in one of the disputed pockets or enclaves, a point which the Special Master found unclear, Report 67–68, this one incident

hardly suffices to demonstrate a continuous policy. Indeed, contrary authority exists. In 1934 the Departments of State and Commerce exchanged letters expressing their shared understanding that the United States lacked the power to enforce the Act more than three miles from the shore of any island or the mainland. *Id.*, at 70–71 (quoting Letter from Daniel C. Roper, Secretary of Commerce, to Secretary of State 1 (Sept. 5, 1934) (" 'Canadian fishermen may operate [in the Alexander Archipelago waters] so long as they remain outside the three mile limit' "); and Letter from William Phillips, Under Secretary of State, to Secretary of Commerce 1 (Sept. 13, 1934) (expressing appreciation for the assurance " 'that the Fishery laws and regulations will be enforced by the Bureau of Fisheries in conformity with the view that Canadian fishermen may operate [in the Alexander Archipelago waters] so long as they remain outside the three-mile limit' ")). This understanding was inconsistent with a view of the Alexander Archipelago waters as inland. Report 70–71, 110–111.

Even were the seizure of the *Marguerite* taken as evidence of a right asserted by the United States in 1924, the official correspondence cited by the Special Master establishes that by 1934 the United States had reverted to the position taken in Secretary Bayard's 1886 letter. As the United States observes, furthermore, the fact that Britain protested the seizure of the *Marguerite* indicates that any claim of right implied from that seizure was not one in which foreign nations acquiesced. Reply Brief for United States 17, n. 10.

Alaska also refers to various poststatehood events which, in its view, confirm the status of the Alexander Archipelago waters as inland waters. We find insufficient prestatehood evidence to establish inland waters status in the first place, and so we find it unnecessary to discuss these further events.

At best, Alaska's submissions before this Court establish that the United States made one official statement—in the 1903 Alaska Boundary Arbitration—describing the Alexander Archipelago waters as inland, and that the United States

seized one foreign vessel—the *Marguerite*—in a manner arguably consistent with the status of those waters as inland. These incidents are insufficient to demonstrate the continuous assertion of exclusive authority, with acquiescence of foreign nations, necessary to support a historic inland waters claim. Alaska's exception to the Special Master's recommendation on count I of the Amended Complaint is overruled.

IV

In count II of its Amended Complaint, Alaska presents an alternative theory to justify treating the Alexander Archipelago's waters as inland. Alaska's alternative theory is that the waters of the Alexander Archipelago in truth consist of two vast, but as yet unnoticed, juridical bays. Waters within a juridical bay would be deemed inland waters. Art. 5(1) of the Convention, 15 U. S. T., at 1609. Thus, if accepted, Alaska's theory would render all the Alexander Archipelago's waters inland waters to the extent they lie within the limits of the bays Alaska identifies. For this reason, and because the United States would not be able to rebut the presumption of title that would arise from inland waters status, Alaska's alternative theory would require the Court to accept Alaska's claim of title to the pockets and enclaves in dispute.

The parties agree that Alaska's claimed juridical bays would exist only if four of the Alexander Archipelago's islands—Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island—were deemed to be connected to each other and to the mainland. We have recognized that such "assimilat[ion]" of islands fringing the mainland is possible, albeit only in "exceptional case[s]" in which "an island or group of islands . . . 'are so integrally related to the mainland that they are realistically parts of the "coast."'" *United States* v. *Maine*, 469 U. S. 504, 517 (1985) (quoting *United States* v. *Louisiana*, 394 U. S., at 66). If the assimilation Alaska urges were accepted, the four islands Alaska has identified

would form a constructive peninsula extending from the mainland and dividing the Alexander Archipelago's waters in two. To bolster its case, Alaska labels the waters north and south of this hypothetical peninsula the "North Bay" and the "South Bay." See Appendix B, *infra* (map showing Alaska's hypothetical peninsula and the resulting bays).

Were we to accept Alaska's hypothetical peninsula, we would then be required to determine whether North Bay and South Bay in fact qualify as juridical bays under the Convention, which we have customarily consulted for purposes of "determining the line marking the seaward limit of inland waters of the States." *United States* v. *Maine*, *supra*, at 513. Article 7(2) of the Convention sets forth the following geographic criteria for deciding whether a body of water qualifies as a bay:

> "For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." 15 U. S. T., at 1609.

This definition can be understood to comprise a number of elements. To apply the definition to a given body of water, one must first determine whether the body of water satisfies the descriptive test of being a "well-marked indentation." One must then determine, among other things, whether the indentation's area satisfies the mathematical "semi-circle" test set forth in the second sentence of Article 7(2).

After due consideration of the parties' arguments, the Special Master recommended that the Court reject Alaska's alternative theory. The Special Master first conducted a detailed assessment of the propriety of assimilating the four

islands in question in order to form the constructive peninsula so critical to Alaska's theory. Report 147–197. Applying the principles set forth in *United States* v. *Maine*, *supra*, at 514–520, and *United States* v. *Louisiana*, *supra*, at 60–66, the Special Master concluded that assimilation would be unwarranted save for two inconsequential channels that "do not suffice to create the juridical bays alleged by Alaska." Report 197. In the alternative, the Special Master concluded that, even were Alaska's hypothetical peninsula accepted, neither "North Bay" nor "South Bay" could satisfy the descriptive test that a proposed bay constitute a "'well-marked indentation.'" *Id.*, at 222.

Excepting to the Special Master's recommendations, Alaska makes a detailed argument that this Court's precedents regarding assimilation of islands support recognition of the constructive peninsula Alaska has identified. Exceptions and Brief for Plaintiff Alaska 39–45. Alaska further contends that, once this peninsula is recognized, the resulting bodies of water satisfy all the criteria set forth in the Convention. *Id.*, at 45–49.

We overrule Alaska's exception. For the sake of brevity we assume, *arguendo*, that each of the islands in Alaska's hypothetical peninsula should be assimilated one to another (though we are aware of, and Alaska itself cites, no precedent foreign or domestic in which such a massive amount of successive assimilation has been accepted for the purpose of identifying a juridical bay). Even with the benefit of this daunting doubt Alaska could not prevail, for its hypothetical bays do not satisfy the Convention's descriptive requirement of being well-marked indentations.

To qualify as a well-marked indentation, a body of water must possess physical features that would allow a mariner looking at navigational charts that do not depict bay closing lines nonetheless to perceive the bay's limits, and hence to avoid illegal encroachment into inland waters. See G. Westerman, The Juridical Bay 82–85 (1987). Alaska's hypotheti-

cal bays do not possess these features. We have been referred to no authority which indicates that a mariner looking at an unadorned map of the southeast Alaskan coast has ever discerned the limits of Alaska's hypothetical bays. So subtle are these limits that even Alaska itself did not discover them until after it had filed its first complaint in this action. Compare Complaint to Quiet Title (Nov. 24, 1999) with Amended Complaint (Dec. 14, 2000). The test is what mariners see, not what litigators invent. Alaska's hypothetical bays would not be discernible to the eye of the mariner.

A comparison to *United States* v. *Maine*, 469 U. S., at 514–520, makes clear the force of our conclusion. In that case the Court considered whether Long Island Sound and Block Island Sound together qualify as a juridical bay. In determining that they do, the Court held that Long Island itself should be assimilated to the mainland. *Id.*, at 517–520. The Court then determined that the resulting indentation formed by Long Island Sound and Block Island Sound satisfied the requirements of Article 7(2) of the Convention, including the descriptive requirement of being a "well-marked indentation." *Id.*, at 515, 519.

There is a critical difference between this body of water and the bodies of water Alaska has christened as North Bay and South Bay. Even before this Court held that Long Island Sound and Block Island Sound qualified together as a juridical bay, mariners and geographers had recognized Long Island Sound and Block Island Sound as adjacent, cohesive bodies of water—indeed, as "sound[s]," which itself is a term used to describe a wide and deep bay, or a strait connecting other bodies of water. See Webster's Third New International Dictionary 2176 (1981) (defining "sound" as "a long and rather broad inlet of the ocean generally with its larger part extending roughly parallel to the coast"; "a long passage of water connecting two larger bodies but too wide and extensive to be termed a strait"). Nothing of the sort can be said of Alaska's claimed bays. It is not just that no mariner and

no geographer (and not even Alaska's litigators) before this action recognized Alaska's claimed bays as bays or sounds. It appears that no one before this action recognized Alaska's claimed bays as constituting cohesive bodies of water at all.

Even accepting the constructive peninsula Alaska has crafted out of four separate islands within the Alexander Archipelago, Alaska's claimed bays still fail to qualify as "well-marked indentation[s]" for purposes of the Convention. For this reason, we reject the alternative theory Alaska urges in count II of its Amended Complaint. Alaska's exception to the Special Master's recommendation on this count is overruled.

V

In count IV of its Amended Complaint, Alaska claims title to the submerged lands underlying the waters of Glacier Bay National Monument (now known as Glacier Bay National Park), located at the northern end of the Alexander Archipelago. Concluding that the United States had rebutted Alaska's presumed title to these lands, the Special Master recommended granting summary judgment to the United States. As with the other aspects of this case, the Special Master was correct in his interpretation and application of the controlling precedents and principles, and we overrule Alaska's exception to his recommendation.

A

The centerpiece of Glacier Bay National Park is Glacier Bay itself. By contrast to the bays Alaska claims in count II, Glacier Bay is a textbook example of a juridical bay. Its waters mark a dramatic indentation within the coastline of the Alaskan mainland. While the width of Glacier Bay's mouth measures 5 miles at most, the bay's waters stretch more than 60 miles into the mainland. See Appendix C, *infra* (map of Glacier Bay).

Glacier Bay National Park is one of the Nation's largest national parks, embracing over 3.2 million acres, an area

larger than the State of Connecticut. Rennicke, North to Wild Alaska, National Geographic Traveler 48, 55 (July/Aug. 1994). John Muir, who first saw the bay and its surroundings in 1879, described it as a "'solitude of ice and snow and newborn rocks.'" *Id.*, at 56. One way to comprehend the solitude is to note that in the area of Glacier Bay there are still not more than 10 miles of established hiking trails. See *id.*, at 50. As the world's largest marine sanctuary, it is, in one sense, a water park.

A ship in the waters of the Pacific in the Gulf of Alaska reaches Glacier Bay by heading shoreward to the east through Cross Sound and to Bartlett Cove, there turning to proceed through the bay in a generally northwest direction. See Appendix D, *infra*. The entrance to the bay near Bartlett Cove is about 100 miles northwest of Juneau and still 600 miles southeast of Anchorage.

The bay owes its name to Captain Beardslee of the United States Navy, who, upon first entering the bay in 1880, was so impressed by the ice formations surrounding it that he called it Glacier Bay. 5 New Encyclopaedia Britannica 290 (15th ed. 2003). A glacier is a large formation of perennial ice. The definition used by the Special Master was a "'mixture of ice and rock that moves downhill over a bed of solid rock or sediment under the influence of gravity.'" Report 246. Some of the glaciers in the region are tidewater glaciers, so called because they end at the water's edge. Even large ships must take precautions near these glaciers, for ice can break off (a process called calving); and when a large segment plunges to the sea, it becomes an iceberg. *Ibid.*

The weight of a glacier can cause it to move, either advancing to crush the life before it or receding to allow life forms to begin anew. At Glacier Bay some of the glaciers are advancing, some are receding, and others seem to be stable. See *id.*, at 246–247.

At least in Glacier Bay, the extreme slowness suggested by the term "glacial" is inapt, for the ice once present where

the bay now extends receded with (in a geological context) astounding speed. When Captain George Vancouver visited in 1794, the bay was but 5 miles inward from Bartlett Cove, while today it penetrates inland for over 60 miles. This retreat of the ice is "considered the fastest glacial withdrawal in recorded history. 'Unzipping,' the geologists call it. The landscape dancing in geologic time." Rennicke, *supra*, at 56. The advance and retreat of the glaciers are of great interest to scientists, and in the areas of glacial recession the submerged floor of the bay is contoured or sculptured in ways that can be studied to learn more of glacial movement and geologic formations. See Report 246–248.

The immense scene is one of remarkable beauty, and the waters, which accommodate large vessels, can be calm enough so that kayaks can be used to explore the bay and its surroundings. Where glaciers have retreated either in the bay or on shore, the retreat reveals how a new life cycle begins. Plant succession is of absorbing interest. "It can be almost like a chant: lichens and algae, moss and dryas, fireweed, willows, alder, and spruce." Rennicke, *supra*, at 56.

The bay and the surrounding shore and forest areas of the park sustain a chain of fish, bird, and animal life. Over 200 avian species have been noted, most of these in or near the marine environment. Glacier Bay: A Guide to Glacier Bay National Park and Preserve, Alaska 78 (1983). There are mussels and crabs on the shore, and in the bay's waters there are numerous fish, including herring and salmon. The light in the long days of summer, and the oxygen-rich waters, accelerate phytoplankton populations, and this is part of the food chain working up to the herring and salmon, then porpoises, seals, and sea lions. The bay also has whales, including the humpback whale. K. Jettmar, Alaska's Glacier Bay: A Traveler's Guide 53 (1997).

In the 1930's, when naturalists and other observers were supporting the movement to expand Glacier Bay National

Monument beyond its initial boundaries, the brown bear became the flagship species for the cause. Declaration of Theodore R. Catton 51, Exhibits to Reply of United States in Support of Motion for Partial Summary Judgment on Count IV of Amended Complaint, Tab No. 3 (Exh. U. S. IV–3). One of the largest of omnivores, the brown bear's food in estuarine areas includes "vegetation, invertebrates (clams, mussels, worms, barnacles, amphipods), carcasses of fish and marine mammals washed onto the beach, and winter-killed ungulates . . . ." Declaration of Victor Barnes 3 (Exh. U. S. IV–6). Brown bears find salmon in streams, and (with distressing frequency) they can swim to the small islands to raid the nesting places of birds and water fowl. *Id.*, at 9. When bears swim in the bay, they are particularly vulnerable to hunters. When he was considering the proposal to extend the boundaries of the Glacier Bay National Monument, President Franklin Roosevelt was angered by accounts of bears being shot from pleasure yachts. *Id.*, at 16.

Reference to the complex ecosystem of Glacier Bay and the surrounding land is important for understanding the purposes that led the United States to create Glacier Bay National Monument. These purposes, in turn, inform the inquiry whether title to the submerged land underlying the waters of Glacier Bay National Monument passed to Alaska at statehood. See *Idaho* v. *United States*, 533 U. S. 262, 274 (2001) (describing the inquiry as encompassing the question whether "the purpose of the reservation would have been compromised if the submerged lands had passed to the State"); *Alaska (Arctic Coast)*, 521 U. S., at 42–43 (noting that "defeating state title . . . was necessary to achieve the United States' objective [of] securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands").

B

Owing to Glacier Bay's status as a juridical bay, its waters qualify as inland navigable waters. All the remaining wa-

ters within the boundaries of Glacier Bay National Monument as it existed at statehood, moreover, lie less than three nautical miles from the coastline. Under both the equal-footing doctrine and the SLA, therefore, a strong presumption arises that title to the lands underlying all the waters in dispute in count IV of Alaska's Amended Complaint passed to Alaska at statehood. See *id.*, at 5–6; see also *id.*, at 33–36. The controlling question here is whether the United States can rebut this presumption.

It is now settled that the United States can defeat a future State's presumed title to submerged lands not only by conveyance to third parties but also by setting submerged lands aside as part of a federal reservation "such as a wildlife refuge." *Idaho* v. *United States*, *supra*, at 273; *Alaska (Arctic Coast)*, 521 U. S., at 33–34. To ascertain whether Congress has made use of that power, we conduct a two-step inquiry. We first inquire whether the United States clearly intended to include submerged lands within the reservation. If the answer is yes, we next inquire whether the United States expressed its intent to retain federal title to submerged lands within the reservation. *Id.*, at 36; *Idaho* v. *United States*, *supra*, at 273. "We will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.'" *Alaska (Arctic Coast)*, *supra*, at 34 (quoting *Holt State Bank*, 270 U. S., at 55).

After careful consideration of the parties' arguments, the Special Master recommended granting summary judgment to the United States on Alaska's claim of title to the submerged lands underlying Glacier Bay. Report 227–276. His recommendation rested on two conclusions that track the two-part test developed in our precedents. First, he concluded that in creating Glacier Bay National Monument the United States had reserved the submerged lands underlying Glacier Bay and the remaining waters within the monument's boundaries. *Id.*, at 264. Second, he concluded that

§ 6(e) of the ASA, 72 Stat. 340–341, note preceding 48 U. S. C. § 21, pp. 320–321, expressed congressional intent to retain those submerged lands in federal ownership. Report 276.

Alaska takes exception only to the Special Master's second conclusion. We nonetheless explain the Special Master's first conclusion (and our own), for it is a necessary part of the reasoning for the second step of the analysis.

C

We need not detain ourselves long with the first part of the test regarding title to submerged lands. In 1925, President Calvin Coolidge invoked the Antiquities Act of 1906, ch. 3060, 34 Stat. 225, 16 U. S. C. § 431 *et seq.*, to create Glacier Bay National Monument. Presidential Proclamation No. 1733, 43 Stat. 1988 (1925 Proclamation). In 1939, President Franklin D. Roosevelt issued a proclamation expanding the monument to include all of Glacier Bay's waters and to extend the monument's western boundary three nautical miles out to sea. Presidential Proclamation No. 2330, 3 CFR 28 (Supp. 1939) (1939 Proclamation). See Appendix C, *infra* (depicting both the initial boundaries established by the 1925 Proclamation and the expanded boundaries established by the 1939 Proclamation). In 1955, President Dwight D. Eisenhower issued a proclamation slightly altering the monument's boundaries, but leaving the bay's waters within them. Presidential Proclamation No. 3089, 3 CFR 36 (1954–1958 Comp.) (1955 Proclamation). In 1980, Congress designated the monument as part of Glacier Bay National Park and Preserve and expanded the resulting reservation's boundaries. 16 U. S. C. § 410hh–1(1); see Appendix D, *infra* (map of Glacier Bay National Park). For present purposes, however, the important point is that by the time Alaska achieved statehood in 1959, the Glacier Bay National Monument had already existed for 34 years as a federal reservation.

After considering the evidence submitted by both parties, the Special Master concluded that "the Glacier Bay National

Monument, as it existed at the time of statehood, clearly included the submerged lands within its boundaries." Report 263–264. According to the Special Master, the descriptions of the monument in the 1925, 1939, and 1955 Proclamations themselves showed that the monument embraced submerged lands. *Id.*, at 232–242. The Special Master also considered it significant that exclusion of the submerged lands would have undermined at least three of the purposes that led the United States to create Glacier Bay National Monument. Exclusion of the submerged lands would impair scientific study of the majestic tidewater glaciers surrounding the bay. *Id.*, at 245–251. It would also impair efforts both to study and to preserve the remnants of "'interglacial forests,'" which can be found both above and below the tideline. *Id.*, at 251–253. Finally, exclusion of the submerged lands would compromise the goal of safeguarding the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem. *Id.*, at 253–263.

The Special Master, in our view, had ample support for his conclusions that all of these were purposes for creation of the monument, and each would be compromised were it to be determined that submerged lands were not included in the monument. His ultimate determination, that Glacier Bay National Monument included the submerged lands within its boundaries, has strong support in the precedents and in the whole record of the case. Alaska has not filed a formal exception to this determination, and the four-sentence footnote in Alaska's brief which expresses disagreement with it, Exceptions and Brief for Plaintiff Alaska 10–11, n. 4, does not in our view suffice to impeach its validity.

D

Having established the proposition that the Glacier Bay National Monument, at the time of Alaska's statehood, included the submerged lands underlying Glacier Bay, we turn to the remaining question: whether the United States

"'definitely declared or otherwise made very plain'" its intent to defeat Alaska's title to these submerged lands. *Alaska (Arctic Coast)*, 521 U. S., at 34 (quoting *Holt State Bank*, 270 U. S., at 55).

1

The requisite expression of intent might conceivably reside in the very proclamations that invoked the Antiquities Act of 1906 to create and then expand Glacier Bay National Monument. It is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands. *United States* v. *California*, 436 U. S. 32, 36 (1978). An essential purpose of monuments created pursuant to the Antiquities Act, furthermore, is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U. S. C. § 1. From these two premises it would require little additional effort to reach a holding that the Antiquities Act itself delegated to the President sufficient power not only to reserve submerged lands but also to defeat a future State's title to them. Given the reasons motivating the creation of Glacier Bay National Monument and the overall complexity of the Glacier Bay ecosystem, it would be unsurprising to find that the relevant proclamations manifested intent to retain federal title.

One *amicus* has advanced this argument at length, and the United States foreshadows it in a footnote. See Brief for National Parks Conservation Association as *Amicus Curiae* 6–7, 13–16; Reply Brief for United States 32, n. 20. If true, this argument would provide a powerful alternative basis for agreeing with the Special Master's recommendation to grant summary judgment to the United States with respect to Alaska's claim of title to the submerged lands underlying Glacier Bay.

We need pursue this alternative basis no further, however. In our view the provisions of the ASA themselves suffice to

overcome the state ownership presumption arising from the equal-footing doctrine and the SLA and to reserve the submerged lands in Glacier Bay to the United States.

2

The Special Master agreed with the United States that Congress expressed an intent to retain title to all of Glacier Bay National Monument, including the submerged lands within it, in § 6(e) of the ASA. Report 276. To understand § 6(e), we begin by considering its context within the ASA, its text, and the construction we have given to it in an earlier case.

Section 5 of the ASA sets forth a guiding principle regarding title to property within Alaska's boundaries:

> "The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." 72 Stat. 340.

Based on this provision, the new State of Alaska acquired title to any property previously belonging to the Territory of Alaska. The United States, in turn, retained title to its property located within Alaska's borders, "including public lands," subject to certain exceptions set forth in § 6 of the ASA.

One of those exceptions is contained in § 6(e), which provides in pertinent part:

> "All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U. S. C., secs. 192–211), as amended, and under

> the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U. S. C., secs. 230–239 and 241–242), and June 6, 1924 (43 Stat. 465; 48 U. S. C., secs. 221–228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: . . . *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife." *Id.*, at 340–341.

The first quoted part of § 6(e), the initial clause, directs a transfer to Alaska of any federal property located in Alaska and used "for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska" under three particular federal game and wildlife laws. The next quoted part, the proviso, makes clear that the transfer directive in the initial clause has no application to "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."

In *Alaska (Arctic Coast)*, we held that the proviso of § 6(e) expressed congressional intent to retain title to a reservation such as the Arctic National Wildlife Refuge (ANWR), and that the statute's declaration of intent was sufficient to defeat Alaska's presumed title under both the equal-footing doctrine and the SLA. "In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'" 521 U. S., at 56–57 (quoting § 6(e)). If the proviso of § 6(e) applies to Glacier Bay National Monument, as we held it applied to the ANWR in *Alaska (Arctic Coast)*, then it follows that title to the submerged lands underlying Glacier Bay did not pass to Alaska at statehood.

To avoid this reasoning, Alaska first argues that the proviso is limited in scope to federal property already covered by the initial clause; because Glacier Bay is not covered by the initial clause, the State contends, it is not covered by the proviso either. Alaska next argues that even assuming the scope of the proviso is broader than the initial clause, Glacier Bay was not "set apart" "for the protection of wildlife." We reject both of Alaska's arguments.

a

Regarding the relationship between the initial clause and the proviso, Alaska contends the proviso applies only to wildlife refuges or reservations set aside under the three particular federal game and wildlife statutes named in the initial clause. Glacier Bay National Monument was not set aside under any of these particular statutes, of course; so Alaska says that omission from the initial clause dictates omission from the proviso. The United States counters that the initial clause is confined to specific property but that the proviso is a statement of intent to retain federal title which extends to all reservations thus described without regard to the specific statutory authority under which the reservations were set aside.

As the Special Master noted, generalizations about the relationship between a proviso and a preceding clause prove to be of little help in resolving the parties' disagreement about the scope of § 6(e)'s proviso. Report 268. Though it may be customary to use a proviso to refer only to things covered by a preceding clause, it is also possible to use a proviso to state a general, independent rule. "[A] proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used." *McDonald* v. *United States*, 279 U. S. 12, 21 (1929); see also 2A N. Singer, Statutes and Statutory Construction § 47:08, p. 238 (rev. 6th ed. 2000).

We conclude that Alaska's narrow reading of the proviso is neither necessary nor preferred. Section 6(e) begins with specificity. It covers "[a]ll real and personal property" "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska" as identified under three particular federal game and wildlife laws. Those provisions, in turn, make clear that the initial clause's transfer requirement applies to facilities such as certain fish hatcheries, and likely would include specific types of equipment or even vehicles.

Having thus transferred the identified "property," the section proceeds to state a more general reservation, using the word "lands." "*Provided*, [t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities . . . ." The lands here in question were in fact "withdrawn or otherwise set apart," that is to say by the proclamations which created the monument. Though it may not be the usual style, it does not strike us as illogical for the draftsperson of a statute to write it so that it transfers some specific real and personal property and then proceeds to reserve lands in a much larger classification.

Alaska's insistence that the proviso must be limited to what is contained at the outset is foreclosed as well by the decision in *Alaska (Arctic Coast)*. In the proceedings leading up to that decision, Alaska had argued that § 6(e)'s proviso did nothing more than to except lands from the transfer effected in § 6(e)'s initial clause. In Alaska's view, even lands covered by the proviso could still be transferred by virtue of the SLA made applicable to Alaska via § 6(m) of the ASA. See Reply Brief for State of Alaska in *United States* v. *Alaska*, O. T. 1996, No. 84, Orig., pp. 44–45. The Court rejected Alaska's view:

> "If [the Arctic National Wildlife Range is covered by § 6(e)'s proviso], then the United States retained title to submerged lands as well as uplands within the Range.

> This is so despite § 6(m) of the Statehood Act, which applied the Submerged Lands Act of 1953 to Alaska. The Submerged Lands Act operated to confirm Alaska's title to equal footing lands and to transfer title to submerged lands beneath the territorial sea to Alaska at statehood, *unless* the United States clearly withheld submerged lands within either category prior to statehood. In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'" 521 U. S., at 56–57 (emphasis in original).

Thus we have held that § 6(e)'s proviso operates not just negatively and parasitically, only to except refuges or reservations "set apart" for "the protection of wildlife" from the transfer effected by § 6(e)'s main clause, but also affirmatively and independently, as an expression of Congress' intent to retain federal ownership over all lands within such reservations.

This affirmative and independent expression of intent logically applies with just as much force to reservations that fall within § 6(e)'s initial clause as to those that do not. It would have made little sense for Congress to differentiate between those two sets of reservations in making the broad statement of intent we have construed § 6(e)'s proviso to set forth. It would have made even less sense to differentiate in such a way as to exclude reservations set aside pursuant to the Antiquities Act, like Glacier Bay National Monument. The differentiation suggested by Alaska's reading, moreover, cannot be discerned from the text of § 6(e)'s proviso, which covers all reservations set aside "for the protection of wildlife," regardless of the specific authority under which those reservations were set aside.

Alaska is correct to note that our decision in *Alaska (Arctic Coast)* did not directly address the relationship between the initial clause and the proviso in § 6(e). As Alaska observes, it appears that we assumed the ANWR would fall within § 6(e)'s initial clause were it not for the proviso. *Id.*, at 60–61. For the reasons we have explained, however, the broad construction we gave to the proviso in *Alaska (Arctic Coast)* of necessity carries consequences for the relationship between it and the initial clause.

b

Anticipating the possibility that its narrow interpretation of the proviso might be rejected, Alaska raises one last argument. The proviso does not reach Glacier Bay even under a broad view of the proviso's scope, Alaska contends, because Glacier Bay was not set apart "for the protection of wildlife" within the meaning of § 6(e).

This argument can be rejected without extended discussion. As the Special Master noted and as we have recognized, Congress has made clear that one of the fundamental purposes of wildlife reservations set apart pursuant to the Antiquities Act is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U. S. C. § 1. Because Glacier Bay National Monument serves as habitat for many forms of wildlife, it was set aside in part for its preservation. Any doubt as to this conclusion is dispelled by reference to the Presidential proclamations setting aside the monument, for the proclamations identify the study of flora and fauna as one of the express purposes of the reservation. 1925 Proclamation, 43 Stat. 1988; 1939 Proclamation, 3 CFR 28 (Supp. 1939). As the Special Master observed, the study of flora and fauna necessarily requires their preservation. Report 274.

In sum we agree with the United States that the proviso is best read, in light of our prior interpretation of it in *Alaska (Arctic Coast)*, as expressing an independent and general rule uncoupled from the initial clause. Under the initial clause the United States obligated itself to transfer to Alaska equipment and other property used for general fish and wildlife management responsibilities Alaska was to undertake upon acquiring statehood. Under the proviso the United States expressed its intent, notwithstanding this property transfer, to retain ownership over all federal refuges and reservations set aside for the protection of wildlife, regardless of the specific statutory authority enabling the set-aside. This expression of intent encompassed Glacier Bay National Monument, which was set aside "for the protection of wildlife" within the meaning of § 6(e). The text thus defeated the presumption that the new State of Alaska would acquire title to the submerged lands underlying the monument's waters, including the inland waters of Glacier Bay.

Alaska's exception to the Special Master's recommendation on count IV of Alaska's Amended Complaint is overruled.

VI

For the foregoing reasons, we overrule each of Alaska's exceptions to the Special Master's recommendations. Alaska shall take title neither to the submerged lands underlying the pockets and enclaves of water at issue in counts I and II of its Amended Complaint nor to the submerged lands underlying the waters of Glacier Bay at issue in count IV. As to count III of Alaska's Amended Complaint, the parties and the Special Master are in agreement that this Court should confirm the United States' proposed disclaimer of title. The proposed disclaimer is hereby accepted.

The parties are directed to prepare and submit to the Special Master an appropriate proposed decree for the Court's consideration. The Court retains jurisdiction to entertain

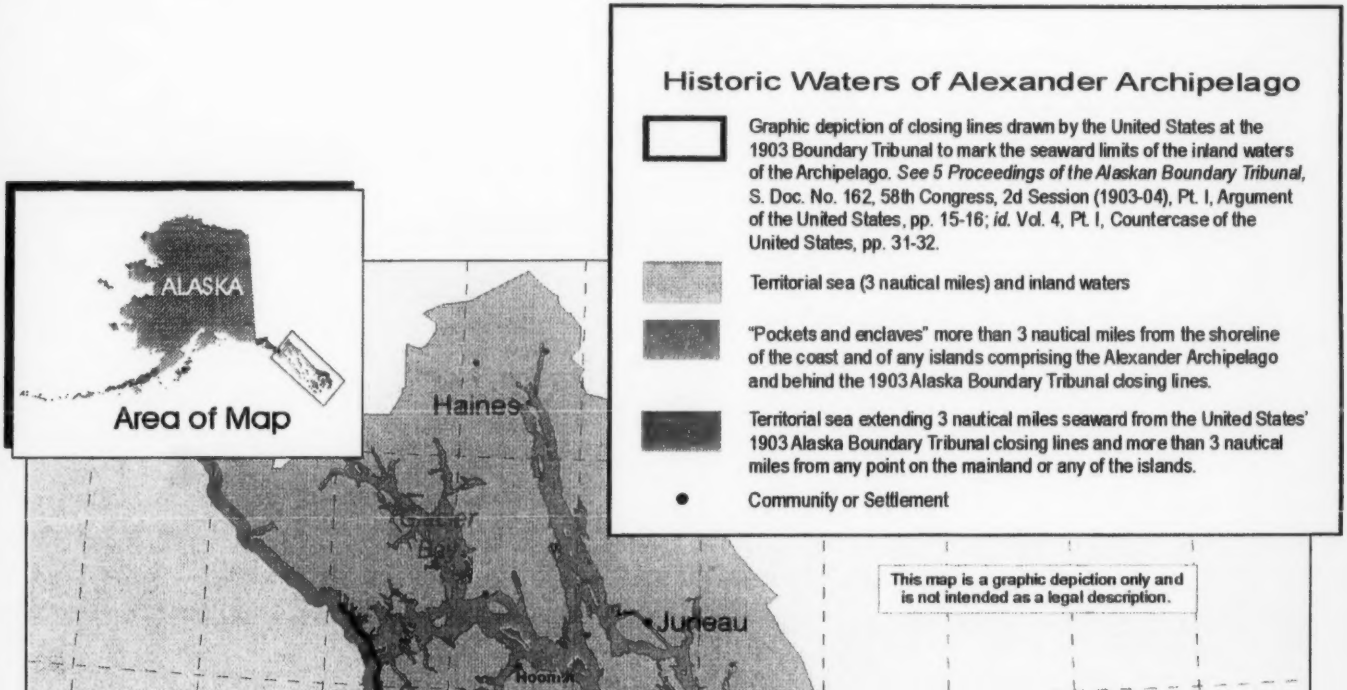
such proceedings, enter such orders, and issue such writs as may become necessary or advisable to effect and supplement the forthcoming decree and the respective rights of the parties.

It is so ordered.

[Appendixes A, B, C, and D to opinion of the Court follow this page.]

APPENDIX A TO OPINION OF THE COURT

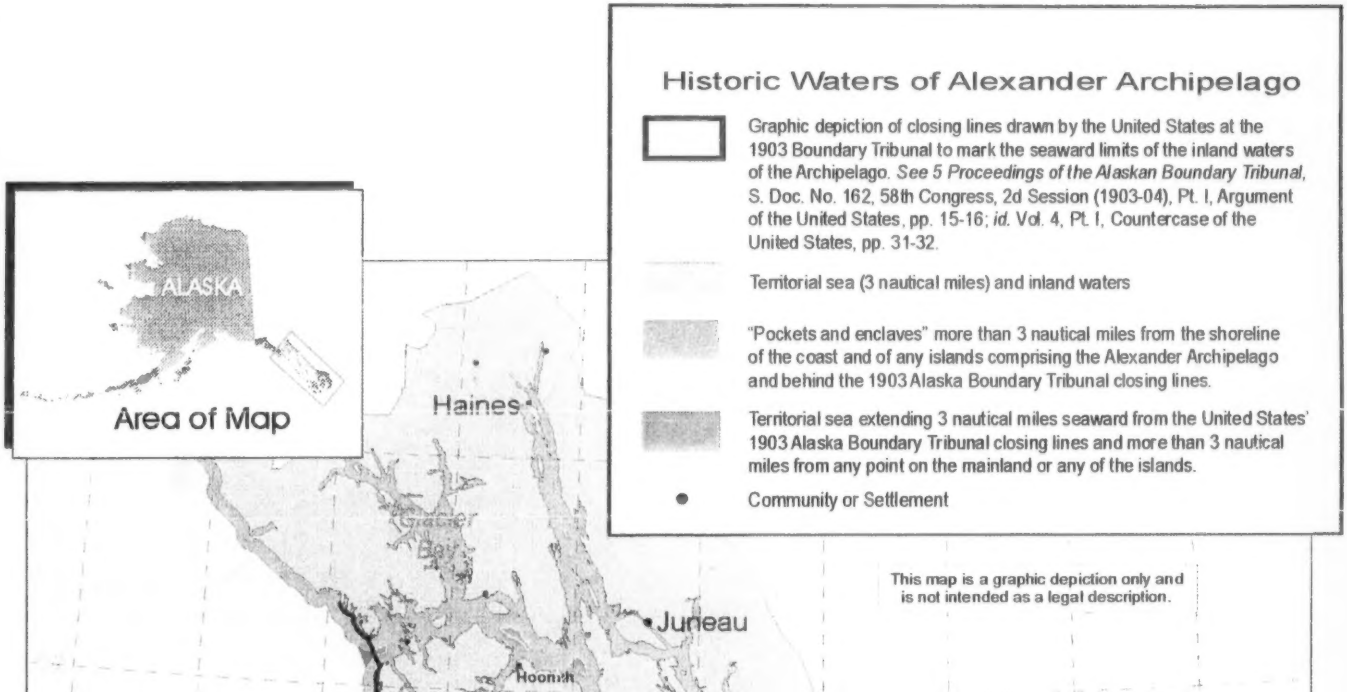
GRAPHIC DEPICTION OF CLAIMED HISTORIC INLAND WATERS



Prepared by the Department of Natural Resources, Division of Mining, Land & Water - Technical & Data Management Section *October 1999*

APPENDIX A TO OPINION OF THE COURT

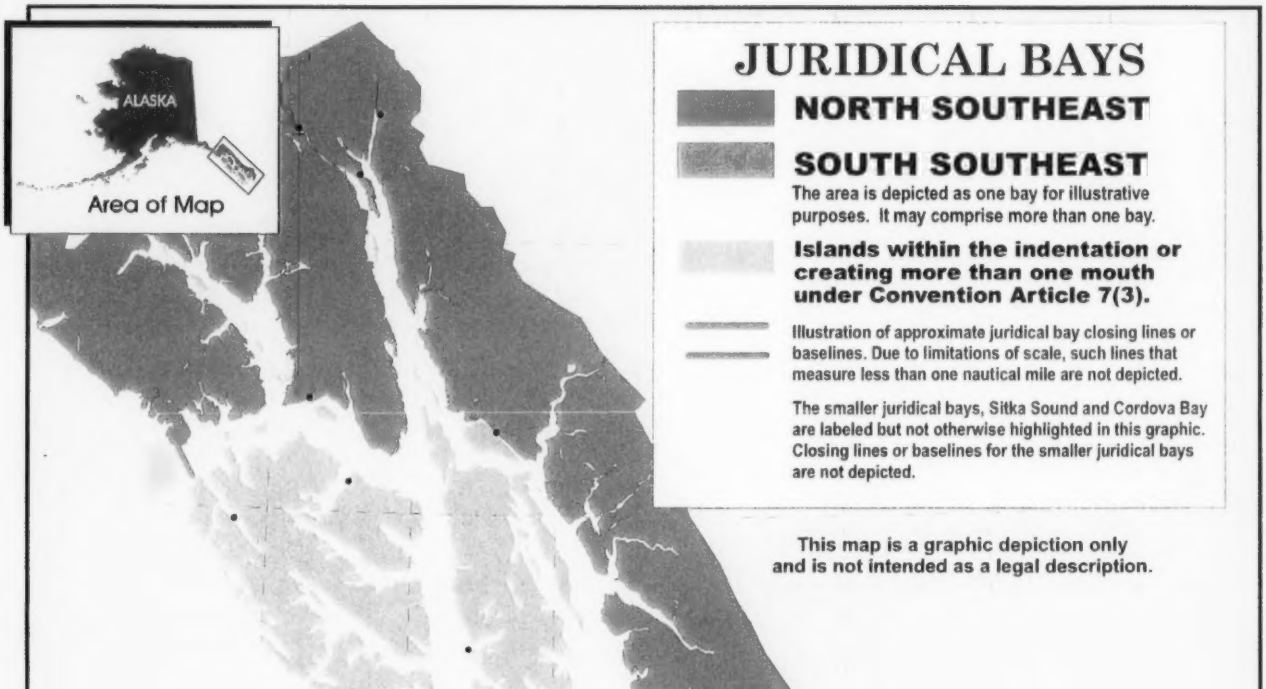
GRAPHIC DEPICTION OF CLAIMED HISTORIC INLAND WATERS

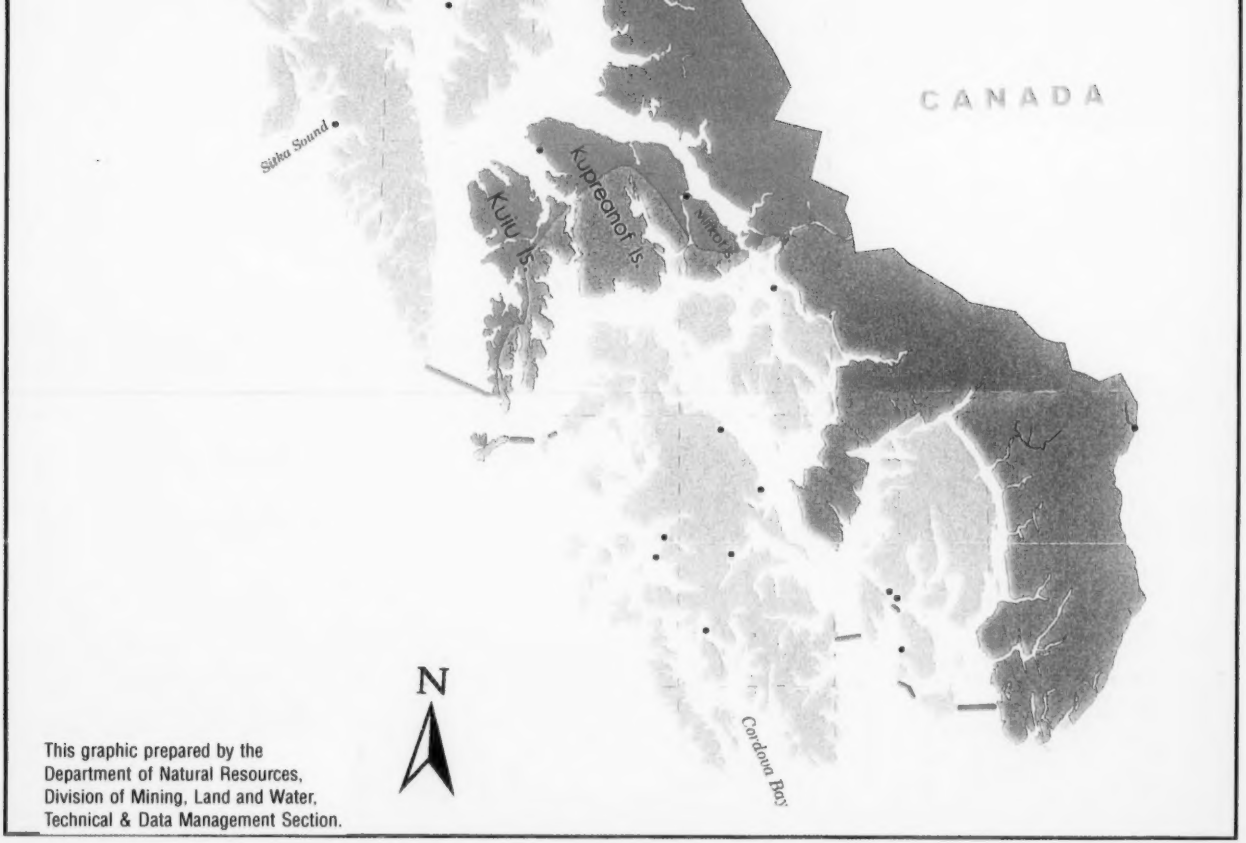


Prepared by the Department of Natural Resources, Division of Mining, Land & Water - Technical & Data Management Section *October 1999*

APPENDIX B TO OPINION OF THE COURT

GRAPHIC DEPICTION OF CLAIMED JURIDICAL BAYS

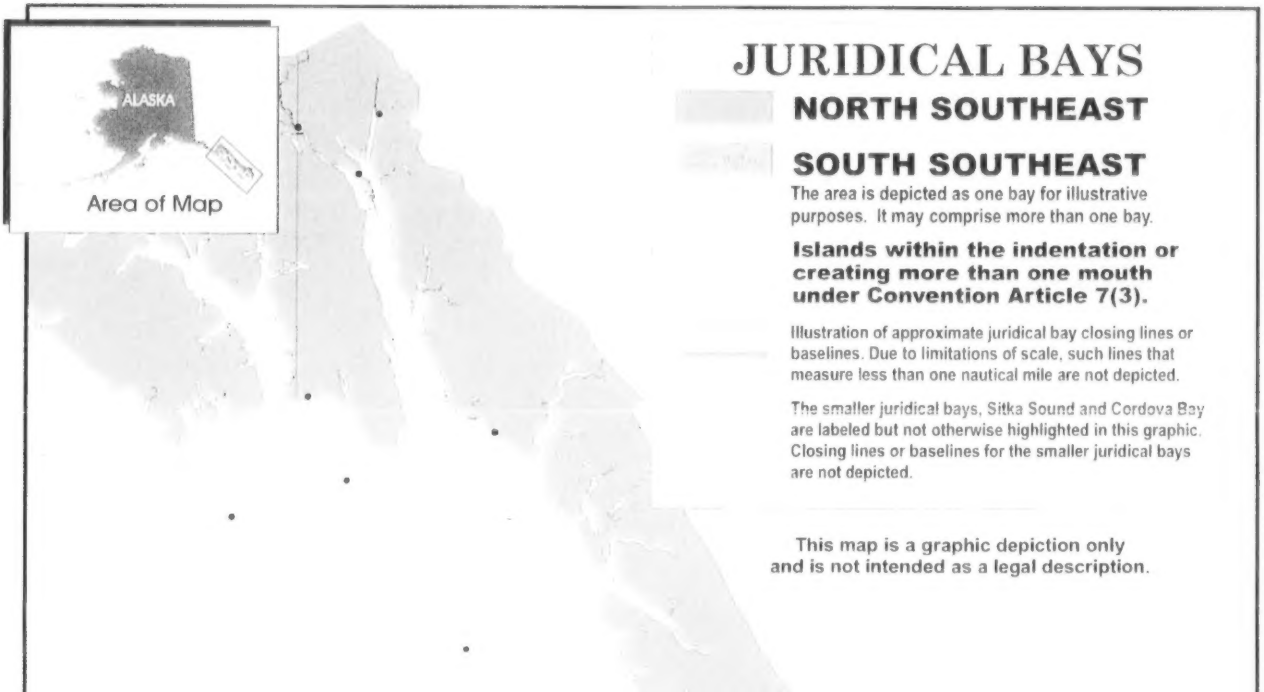


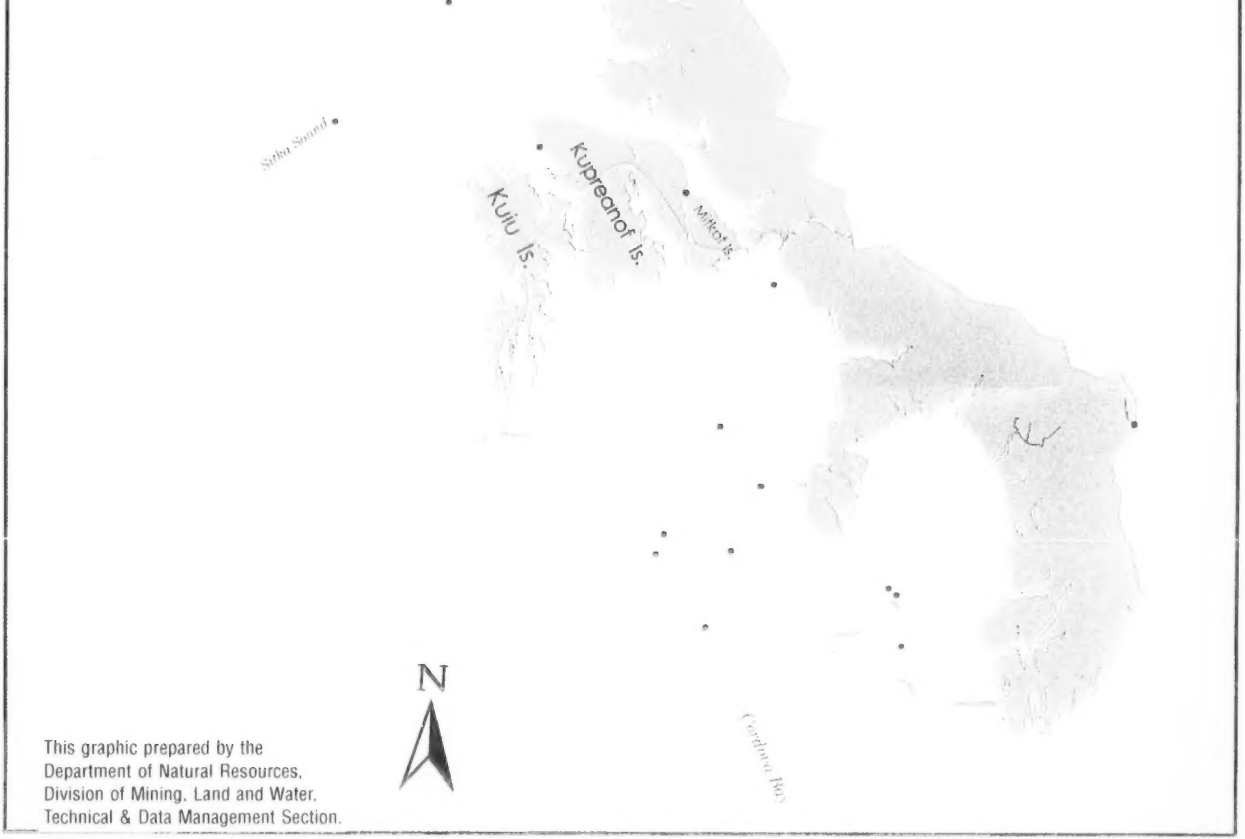


On this map, which was appended to Alaska's Amended Complaint, Alaska's claimed juridical bays are labeled as "North Southeast" and "South Southeast." Alaska now refers to them as "North Bay" and "South Bay" respectively. Exceptions and Brief for Plaintiff Alaska 37, n. 24.

APPENDIX B TO OPINION OF THE COURT

GRAPHIC DEPICTION OF CLAIMED JURIDICAL BAYS

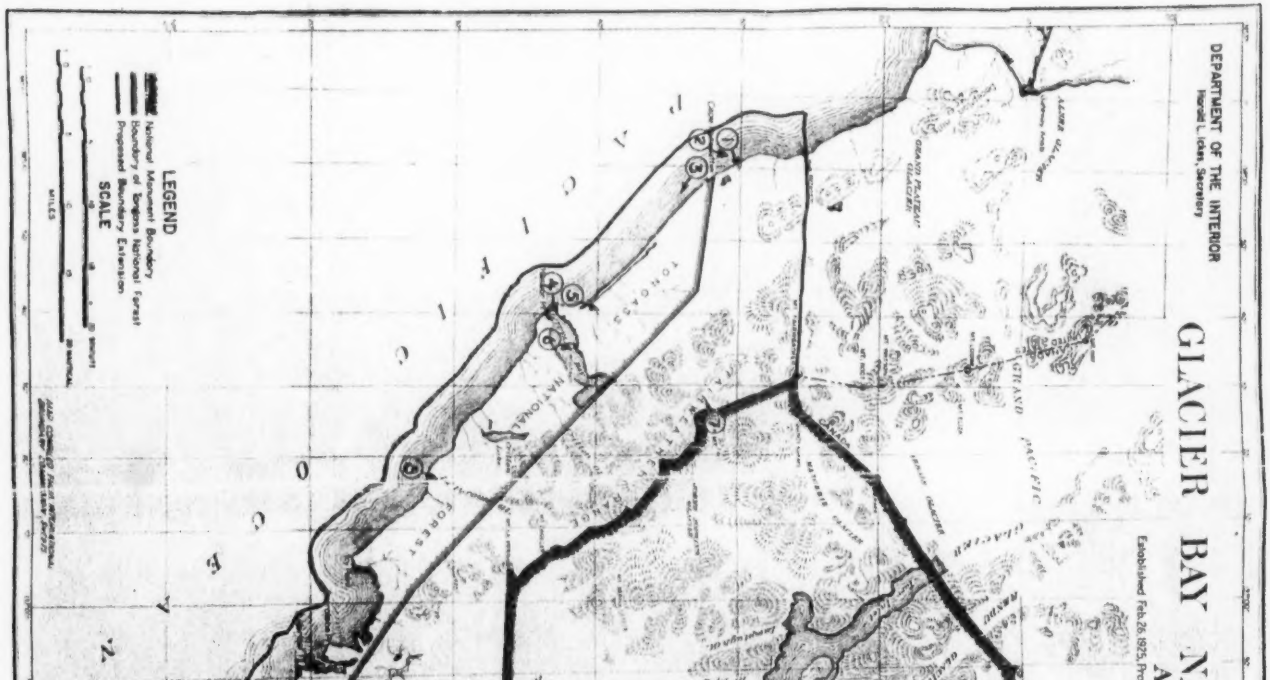




On this map, which was appended to Alaska's Amended Complaint, Alaska's claimed juridical bays are labeled as "North Southeast" and "South Southeast." Alaska now refers to them as "North Bay" and "South Bay" respectively. Exceptions and Brief for Plaintiff Alaska 37, n. 24.

APPENDIX C TO OPINION OF THE COURT

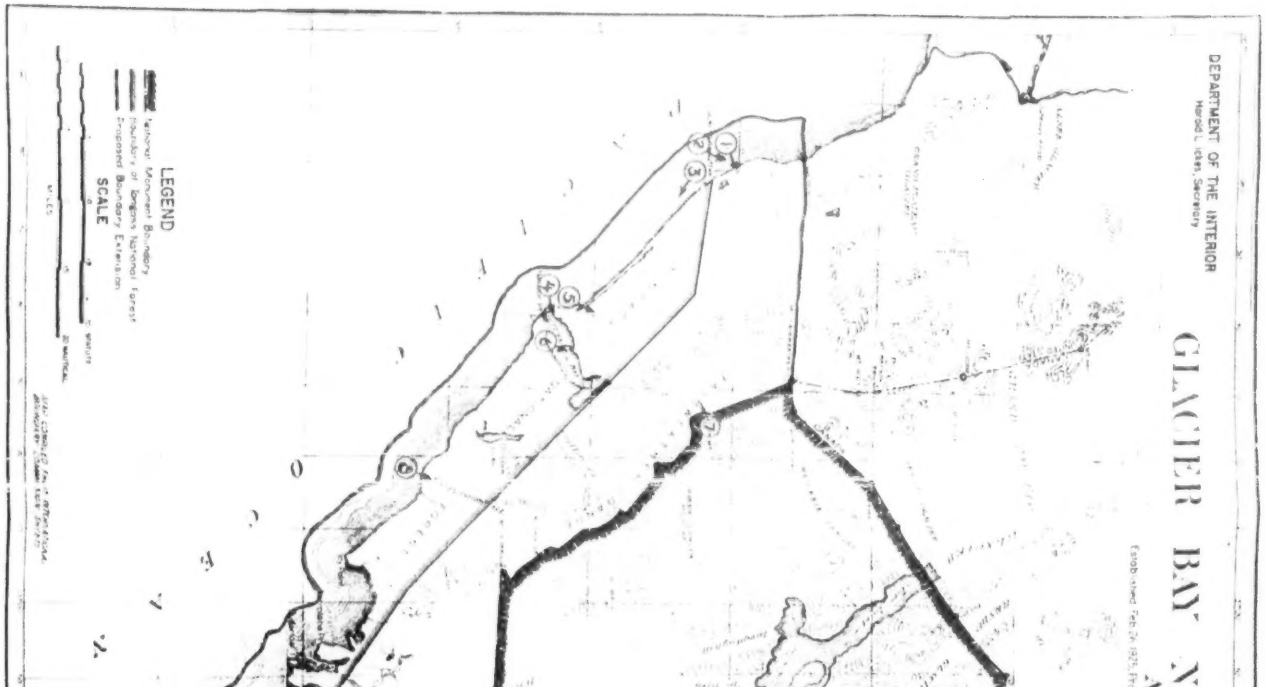
CHART OF GLACIER BAY NATIONAL MONUMENT



The thick red line shows the initial boundaries of Glacier Bay National Monument as established in the 1925 Proclamation. The thin red line shows the expanded boundaries of Glacier Bay National Monument as established in the 1939 Proclamation. Report 227-228.

APPENDIX C TO OPINION OF THE COURT

CHART OF GLACIER BAY NATIONAL MONUMENT



The thick red line shows the initial boundaries of Glacier Bay National Monument as established in the 1925 Proclamation. The thin red line shows the expanded boundaries of Glacier Bay National Monument as established in the 1939 Proclamation. Report 227-228.

APPENDIX D TO OPINION OF THE COURT

OFFICIAL MAP OF GLACIER BAY NATIONAL PARK AND PRESERVE

Published by the National Park Service, United States Department of the Interior.

APPENDIX D TO OPINION OF THE COURT

OFFICIAL MAP OF GLACIER BAY NATIONAL PARK AND PRESERVE

Published by the National Park Service, United States Department of the Interior.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in part and dissenting in part.

I join all of the Court's opinion, except for Part V and the related portions of Part VI. I do not agree with the conclusion that the United States expressly retained title to submerged lands within Glacier Bay National Monument (Monument) at the time of Alaskan statehood.

The Court holds that the United States has rebutted the "strong presumption" that submerged lands passed to Alaska when it became a State. *Ante*, at 100, 110. That presumption inheres in the equal-footing doctrine, but is given particular strength and specificity in this case by § 6(m) of the Alaska Statehood Act, 72 Stat. 343, which incorporated the Submerged Lands Act of 1953, including the confirmation that a State owns all "lands beneath navigable waters within [its] boundaries" unless (as relevant here) they were "*expressly* retained by or ceded to the United States when the State entered the Union," 43 U. S. C. §§ 1311(a), 1313(a) (emphasis added). The Court acknowledges that state title to submerged lands cannot be defeated "'"unless the intention was definitely declared or otherwise made very plain."'" *Ante*, at 100 (quoting *United States* v. *Alaska*, 521 U. S. 1, 34 (1997) *(Alaska (Arctic Coast))*, in turn quoting *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926)). Though the Court makes a dictal feint toward the Antiquities Act of 1906, *ante*, at 103, its holding relies on only a single proviso to § 6(e) of the Alaska Statehood Act, *ante*, at 104–110.

That proviso seems to me anything but a "'very plain'" or "clear" retention of the Monument's submerged lands. *Alaska (Arctic Coast)*, *supra*, at 34, 57. Indeed, the Court's own evaluation of the parties' textual arguments is candidly lukewarm toward the United States' position. Alaska's doomed construction of the proviso is deemed to be "neither necessary nor preferred," *ante*, at 107—not exactly a death knell when Alaska's *opponent* is subject to the clear-statement requirement. The Court applauds the United

States' construction—the victorious, allegedly "clear" one—just for being "not . . . illogical," and admits that that construction means the statute was not written in "the usual style." *Ibid.*

The statutory text fully justifies this lack of exuberance. Section 5 of the Alaska Statehood Act established a general rule that "the United States shall retain title to all property . . . to which it has title . . . ." 72 Stat. 340. Section 6(m), by incorporating the Submerged Lands Act, generally excepted submerged lands from that rule. *Id.*, at 343. Another exception to the rule of U. S. retention was §6(e), which consisted of two relevant parts: the main clause, which required the "transfe[r] and conve[yance] to the State of Alaska" of "[a]ll real and personal property of the United States . . . specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under [certain statutory provisions]," *id.*, at 340; and the proviso, which said "[t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife," *id.*, at 341. The short of the matter is that if the proviso created only an exception from the preceding main clause, it did not reserve Glacier Bay (which was not covered by the main clause) for the United States; whereas if it was an independent and freestanding reservation, it did.

The Court unconvincingly attempts to sever the proviso from its statutory text and context. It is true enough that by accumulation of sloppy usage a proviso need not, simply by reason of its introductory words ("provided that"), always be taken as a limitation only upon the preceding clause. *Ante*, at 106. But the Court fatally fails to cope with the actual text of this particular proviso. It claims, *ante*, at 107, that §6(e) moves from a specific main clause ("[a]ll real and personal property" under three statutes) to a general proviso ("lands withdrawn . . . as refuges"). But "lands" is not inherently more general than "real . . . property" and there is

no reason whatever why the qualified former ("lands withdrawn . . . as refuges") cannot be a subset of the qualified latter ("real . . . property" under three statutes). Moreover, the Court disregards obvious clues to the relationship between these two parts of § 6(e). It makes no attempt to identify the antecedent for the proviso's reference to "*such* transfer." (Emphasis added.) As it happens, the main clause of § 6(e) contains the *only* mention of a "transfe[r]" in the Statehood Act that precedes the proviso,[1] making it the only logical antecedent. Thus, the word "such" indicates the natural, structural tie between § 6(e)'s main clause and its proviso, making it quite clear that the proviso does not reserve to the United States *all* "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife," but rather only the lands of that description *covered by the preceding main clause.* Moreover, the proviso is phrased as a carveout ("such transfer shall not include lands") rather than a freestanding rule (*e. g.*, "no transfer shall include lands" or "lands shall not be transferred"). In sum, the text amply supports Alaska's claim that the proviso operates as an exception to the main clause, and not the Court's conclusion that it is "an independent and general rule uncoupled from [that] clause," *ante*, at 110.

The Court also contends that its 1997 decision in *Alaska (Arctic Coast)* "foreclose[s]" Alaska's argument that the proviso operates as an exception to the main clause of § 6(e). *Ante*, at 107. That conclusion follows from neither the holding of *Alaska (Arctic Coast)* nor any reasonable extension of its underlying rationale. As the Court acknowledges, *ante*, at 109, "*Alaska (Arctic Coast)* did not directly address the relationship between the initial clause and the proviso in § 6(e)." It quoted them as if they were a single, unitary rule, 521 U. S., at 55, and, as the United States concedes, the Court

[1] The only other mention of a "transfe[r]" in § 6 appeared in subsection (k), which "confirmed and transferred" all grants previously made to the Territory of Alaska. 72 Stat. 343.

"assum[ed] with no briefing," Tr. of Oral Arg. 34, that the refuge at issue fell within the scope of the main clause of § 6(e). Given that assumption, the case does not stand for the proposition that the proviso is a freestanding provision; a proviso limited to the main clause would have the same effect. Or to put the point differently: *Alaska (Arctic Coast)* holds that what the proviso takes out of § 6(e) it *also* takes out of § 6(m). In the present case, however, it is undisputed that Glacier Bay is not *within* § 6(e), and so is not *removed* from § 6(e) by the proviso. Nothing in *Alaska (Arctic Coast)* suggests that the proviso alone operated "affirmatively and independently," *ante*, at 108, to trump § 6(m). The Court is thus knocking down a straw man when it says that, if the proviso can trump § 6(m), it would make "little sense" to cabin it with the main clause of § 6(e), *ibid.* It was not the proviso that trumped § 6(m), but the proviso's removal of land from the exception of § 6(e). There is no such removal here.

The only part of the Court's opinion on Glacier Bay that displays genuine enthusiasm is its Ursine Rhapsody, which implies that federal ownership of submerged lands is critical to ensuring that brown bears will not be shot from the decks of pleasure yachts during their "distressing[ly] frequen[t]" swims to islands where they feast on seabirds and seabird eggs.[2] *Ante*, at 99. Surely this is irrelevant to interpretation of the Alaska Statehood Act, unless there is some principle of construction that texts say what the Supreme Court thinks they ought to have said. But besides being irrelevant, it is not even true. Many (though perhaps not all) means of fulfilling the Monument's purposes could be achieved without federal ownership of the submerged lands within the Monument. If title to submerged lands passed to Alaska, the Federal Government would still retain

[2] It is presumptively true that the seabirds consider these visits distressingly frequent, and demonstrably true that the brown bears do not. It is unclear why this Court should take sides in the controversy.

significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power.[3] See, *e. g.*, 43 U. S. C. § 1314(a) (under the Submerged Lands Act, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation"); *United States* v. *Morrison*, 529 U. S. 598, 609 (2000) (Congress may "regulate the use of the channels of interstate commerce" and "protect the instrumentalities of interstate commerce, or persons or things in interstate commerce" (internal quotation marks omitted)); *United States* v. *Alaska*, 503 U. S. 569, 577–583 (1992) (the Secretary of the Army may consider effects upon recreation, fish and wildlife, natural resources, and other public interests when refusing to permit structures or discharges in navigable waters that have "no effect on navigation"); *United States* v. *California*, 436 U. S. 32, 41, and n. 18 (1978) (noting that the United States retained "its navigational servitude" even when California took the "proprietary and administrative interests" in submerged lands surrounding islands in a national monument); *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 284–287 (1977) (finding

[3] The United States presented evidence that, even before the Monument was established, some scientists had studied the bottom of Glacier Bay and its relationship with the glaciers by taking soundings of the water's depth. Memorandum in Support of Motion of the United States for Partial Summary Judgment on Count IV of the Amended Complaint 13. Similar but more sophisticated studies, involving acoustic mapping and sonar imaging of gouges in the floor of the bay, are conducted today. App. 5 to Declaration of Tomie Patrick Lee, Exhibits to Reply of United States in Support of Motion for Partial Summary Judgment on Count IV of Amended Complaint, Tab No. 8, pp. 93–94 (Exh. U. S. IV–8). Alaska's ownership of submerged lands should not hinder such studies, generally conducted from vessels on the water's surface. But the United States also noted that other, newer means of scientific study—such as withdrawing core samples from submerged lands and installing listening devices on the surface of submerged lands—would require Alaska's cooperation. Tr. of Oral Arg. 40.

state regulation of commercial fishing partially pre-empted by federal statute); Letter from W. C. Henderson, Acting Chief, Bureau of Biological Survey, Dept. of Agriculture, to Stephen T. Mather, Director, National Park Service (Nov. 4, 1926), Alaska Exh. AK–405 (noting that a colony of eider ducks in and near the Monument was "protected at all times by the Migratory Bird Treaty Act and Regulations thereunder"). It is thus unsurprising that States own submerged lands in other federal water parks, such as the California Coastal National Monument and the Boundary Waters Canoe Area in Minnesota. See *California*, *supra*, at 37; Brief for National Parks Conservation Association as *Amicus Curiae* 30.

I would probably find for Alaska on the Glacier Bay issue even if the United States did not have to overcome the obstacle of "very plain" retention. With the addition of that well-established requirement, the case is not even close. Because neither text, nor context, nor precedent compels the conclusion that the Alaska Statehood Act expressly retained the Monument's submerged lands for the United States, I cannot agree with the Court's conclusion that the United States deserves summary judgment on count IV of Alaska's amended complaint.

Syllabus

SPECTOR ET AL. *v.* NORWEGIAN CRUISE LINE LTD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03–1388. Argued February 28, 2005—Decided June 6, 2005

Respondent NCL is a cruise line operating foreign-flag ships departing from, and returning to, United States ports. The petitioners, disabled individuals and their companions who purchased tickets for round-trip NCL cruises from Houston, sued NCL under Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12181 *et seq.*, which prohibits discrimination based on disability in places of "public accommodation," § 12182(a), and in "specified public transportation services," § 12184(a), and requires covered entities to make "reasonable modifications in policies, practices, or procedures" to accommodate disabled persons, §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A), and to remove "architectural barriers, and communication barriers that are structural in nature," where such removal is "readily achievable," §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C). Though holding Title III generally applicable, the District Court found that the petitioners' claims regarding physical barriers to access could not go forward because the federal agencies charged with promulgating ADA architectural and structural guidelines had not done so for cruise ships. The court therefore dismissed the barrier-removal claims, but denied NCL's motion to dismiss the petitioners' other claims. The Fifth Circuit held that Title III does not apply to foreign-flag cruise ships in U. S. waters because of a presumption, which the court derived from, *e. g.*, *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, that absent a clear indication of congressional intent, general statutes do not apply to foreign-flag ships. Emphasizing that Title III does not contain a specific provision mandating its application to such vessels, the court sustained the dismissal of the petitioners' barrier-removal claims and reversed on their remaining claims.

Held: The judgment is reversed, and the case is remanded.

356 F. 3d 641, reversed and remanded.

JUSTICE KENNEDY delivered an opinion concluding that except insofar as Title III regulates a vessel's internal affairs, the statute is applicable to foreign-flag cruise ships in U. S. waters. Parts II–A–1 and II–B–2 of that opinion held for the Court:

(a) Although Title III's "public accommodation" and "specified public transportation" definitions, §§ 12181(7)(A), (B), (I), (L), 12181(10), do not

expressly mention cruise ships, there is no doubt that the NCL ships in question fall within both definitions under conventional principles of interpretation. The Fifth Circuit nevertheless held Title III inapplicable because the statute has no clear statement or explicit text mandating coverage for foreign-flag ships in U. S. waters. This Court's cases, particularly *Benz* and *McCulloch*, do hold, in some circumstances, that a general statute will not apply to certain aspects of the internal operations of foreign vessels temporarily in U. S. waters, absent a clear statement. The broad clear statement rule adopted by the Court of Appeals, however, would apply to every facet of the business and operations of foreign-flag ships. That formulation is inconsistent with the Court's case law and with sound principles of statutory interpretation. Pp. 128–130.

(b) Title III defines "readily achievable" barrier removal as that which is "easily accomplishable and able to be carried out without much difficulty or expense," § 12181(9). The statute does not further define "difficulty," but the section's use of the disjunctive indicates that it extends to considerations in addition to cost. Furthermore, Title III directs that the "readily achievable" determination take into account "the impact . . . upon the [facility's] operation," § 12181(9)(B). A Title III barrier-removal requirement that would bring a vessel into noncompliance with the International Convention for the Safety of Life at Sea or any other international legal obligation would create serious difficulties for the vessel and would have a substantial impact on its operation, and thus would not be "readily achievable." Congress could not have intended this result. It is logical and proper to conclude, moreover, that whether a barrier modification is "readily achievable" must take into consideration the modification's effect on shipboard safety. Title III's nondiscrimination and accommodation requirements do not apply if disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures." § 12182(b)(3). It would be incongruous to attribute to Congress an intent to require modifications threatening others' safety simply because the threat comes not from the disabled person but from the accommodation itself. Pp. 135–136.

JUSTICE KENNEDY, joined by JUSTICE STEVENS and JUSTICE SOUTER, concluded in Parts II–A–2, II–B–1, II–B–3, and III–B:

(a) As a matter of international comity, a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations. See, *e. g.*, *Wildenhus's Case*, 120 U. S. 1, 12. In *Benz* and *McCulloch*, the Court held the National Labor Relations Act (NLRA) inapplicable to labor relations between a foreign vessel and its

foreign crew not because foreign ships are generally exempt from the NLRA, but because that particular application of the NLRA would interfere with matters that concern only the ship's internal operations. These cases recognized a narrow rule, applicable only to statutory duties that implicate the foreign vessel's internal order rather than the welfare of American citizens. *E. g., McCulloch, supra,* at 21. In contrast, the Court later held the NLRA fully applicable to labor relations between a foreign vessel and American longshoremen because this relationship, unlike the one between a vessel and its own crew, does not implicate a foreign ship's internal order and discipline. *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 198–201. This narrow clear statement rule is supported by sound principles of statutory construction. It is reasonable to presume Congress intends no interference with matters that are primarily of concern only to the ship and the foreign state in which it is registered. It is also reasonable, however, to presume Congress does intend its statutes to apply to entities in U. S. territory that serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility of the United States, even if those entities happen to be foreign-flag ships. Cruise ships flying foreign flags of convenience but departing from and returning to U. S. ports accommodate and transport over 7 million U. S. residents annually, including large numbers of disabled individuals. To hold there is no Title III protection for the disabled would be a harsh and unexpected interpretation of a statute designed to provide broad protection for them. Pp. 130–133.

(b) Plainly, most of the Title III violations alleged below—that NCL required disabled passengers to pay higher fares and special surcharges; maintained evacuation programs and equipment in locations not accessible to them; required them, but not other passengers, to waive any potential medical liability and to travel with companions; reserved the right to remove them from ships if they endangered other passengers' comfort; and, more generally, failed to make reasonable modifications necessary to ensure their full enjoyment of the services offered—have nothing to do with a ship's internal affairs. However, the petitioners' allegations concerning physical barriers to access on board—*e. g.*, their assertion that most of NCL's cabins, including the most attractive ones in the most desirable locations, are not accessible to disabled passengers—would appear to involve requirements that might be construed as relating to internal ship affairs. The clear statement rule would most likely come into play if Title III were read to require permanent and significant structural modifications to foreign vessels. Pp. 133–135.

(c) Because Title III does not require structural modifications that conflict with international legal obligations or pose any real threat to the safety of the crew or other passengers, it may well follow that Title

III does not require any permanent and significant structural modifications that interfere with cruise ships' internal affairs. If so, recourse to the internal affairs clear statement rule would not be necessary. Cases may arise, however, where it is prudent for a court to invoke that rule without determining whether Title III actually imposes a particular barrier-removal requirement entailing a permanent and significant structural modification interfering with a foreign ship's internal affairs. Conversely, where it is not obvious that a particular physical modification relates to a vessel's basic architecture and construction, but it is clear the modification would conflict with an international legal obligation, the court may simply hold the modification not readily achievable, without resort to the clear statement rule. P. 137.

(d) The holding that the clear statement rule operates only when a ship's internal affairs are affected does not implicate the Court's holding in *Clark* v. *Martinez*, 543 U. S. 371, 380, that statutory language given a limiting construction in one context must be interpreted consistently in other contexts, "even though other of the statute's applications, standing alone, would not support the same limitation." *Martinez* applied a canon for choosing among plausible meanings of an ambiguous statute, not a clear statement rule that implies a special substantive limit on the application of an otherwise unambiguous statutory mandate. Pp. 140–141.

JUSTICE KENNEDY, joined by JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE THOMAS, concluded in Part III–A that if Title III imposed a requirement that interfered with a foreign-flag cruise ship's internal affairs, the clear statement rule would come into play, but that requirement would still apply to domestic ships, and Title III requirements having nothing to do with internal affairs would continue to apply to domestic and foreign ships alike. This application-by-application approach is consistent with how the clear statement rule has traditionally operated. If the rule restricts some NLRA applications to foreign ships (*e. g.*, labor relations with foreign crews in *Benz* and *McCulloch*), but not others (*e. g.*, labor relations with American longshoremen in *Ariadne Shipping*), it follows that its case-by-case application is also required under Title III. The clear statement rule, if it is invoked, would restrict some applications of Title III to foreign ships (*e. g.*, certain structural barrier modification requirements), but not others (*e. g.*, the statute's prohibition on discriminatory ticket pricing). The rule is an implied limitation on a statute's otherwise unambiguous general terms. It operates much like other implied limitation rules, which avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter. See, *e. g.*, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 260. An all-or-nothing approach would convert the clear

statement rule from a principle of interpretive caution into a trap for an unwary Congress, requiring nullification of the entire statute, or of some arbitrary set of applications larger than the domain the rule protects. Pp. 137–139.

JUSTICE GINSBURG, joined by JUSTICE BREYER, agreed that Title III of the Americans with Disabilities Act of 1990 covers cruise ships and allows them to resist modifications that would conflict with international legal obligations, but would give no wider berth to the "internal affairs" clear statement rule in determining Title III's application to respondent's ships. That rule derives from, and is moored to, the broader guide that statutes "should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 815. This noninterference principle is served here by the Court's interpretation of 42 U. S. C. § 12182(b)(2)(A)(iv)'s "readily achievable" language to avoid conflict with international legal obligations. The plurality's further suggestion that the "internal affairs" clear statement rule may block Title III-prompted structural modifications, even in the absence of conflict with international obligations, cuts the rule loose from its foundation. Because international relations are not at risk and the United States has a strong interest in protecting American passengers on foreign and domestic cruise ships, there is no reason to demand a clearer congressional statement that Title III reaches the vessels in question. Pp. 142–145.

JUSTICE THOMAS concluded that Title III of the Americans with Disabilities Act of 1990, insofar as it could be read to require structural changes, lacks a sufficiently clear statement that it applies to the internal affairs of foreign vessels. However, the clear statement rule does not render Title III entirely inapplicable to foreign vessels; instead, Title III applies to foreign ships only to the extent to which it does not bear on their internal affairs. Pp. 146–149.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A–1, and II–B–2, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, an opinion with respect to Parts II–A–2, II–B–1, II–B–3, and III–B, in which STEVENS and SOUTER, JJ., joined, and an opinion with respect to Part III–A, in which STEVENS, SOUTER, and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined, *post*, p. 142. THOMAS, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment in part, *post*, p. 146. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, and in which THOMAS, J., joined as to Part I–A, *post*, p. 149.

Counsel

Thomas C. Goldstein argued the cause for petitioners. With him on the briefs were *Amy Howe*, *Pamela S. Karlan*, *Samuel Bagenstos*, *David George*, *Brady Edwards*, *Anne Edwards*, *Sandra Thourot Krider*, *William H. Bruckner*, and *Elaine B. Roberts*.

David B. Salmons argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Acosta*, *Dennis J. Dimsey*, *Jeffrey A. Rosen*, and *Paul M. Geier*.

David C. Frederick argued the cause for respondent. With him on the brief were *Mark E. Warren*, *Thomas H. Wilson*, *Michael J. Muskat*, and *Michael F. Sturley*.

Gregory G. Garre argued the cause for the Commonwealth of the Bahamas et al. as *amici curiae* in support of respondent. With him on the brief was *Christopher T. Handman*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach*, Deputy Attorney General, *R. Ted Cruz*, Solicitor General, and *William L. Davis*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Lisa Madigan* of Illinois, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Mark L. Shurtleff* of Utah, and *Christine O. Gregoire* of Washington; for Nine Associations Representing Persons with Disabilities by *Andrew P. Tower*, *Ira A. Burnim*, and *Jennifer Mathis;* for Paralyzed Veterans of America et al. by *David C. Vladeck*, *Norman G. Cooper*, and *Robert N. Herman;* and for Jonathan M. Gutoff by *David M. Zlotnick*.

Briefs of *amici curiae* urging affirmance were filed for the American Steamship Owners Mutual Protection and Indemnity Association, Inc., et al. by *David J. Bederman;* for the Chamber of Commerce of the United States of America by *Roy T. Englert, Jr.*, *Max Huffman*, and *Robin S. Conrad;* and for the International Council of Cruise Lines by *Lawrence W. Kaye* and *William J. Tucker*.

Samuel Conte filed a brief for the Mediterranean Shipping Company Crociere, S. p. A., as *amicus curiae*.

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A–1, and II–B–2, an opinion with respect to Parts II–A–2, II–B–1, II–B–3, and III–B, in which JUSTICE STEVENS and JUSTICE SOUTER join, and an opinion with respect to Part III–A, in which JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE THOMAS join.

This case presents the question whether Title III of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 353, 42 U. S. C. § 12181 *et seq.*, applies to foreign-flag cruise ships in United States waters. The Court of Appeals for the Fifth Circuit held Title III did not apply because of a presumption, which it sought to derive from this Court's case law, that, absent a clear indication of congressional intent, general statutes do not apply to foreign-flag ships. 356 F. 3d 641, 644–646 (2004). The Court of Appeals for the Eleventh Circuit, on the other hand, has held that the ADA does apply to foreign-flag cruise ships in United States waters. See *Stevens* v. *Premier Cruises, Inc.*, 215 F. 3d 1237 (2000). We granted certiorari to resolve the conflict. 542 U. S. 965 (2004).

Our cases hold that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations, as contrasted with statutory requirements that concern the security and well-being of United States citizens or territory. While the clear statement rule could limit Title III's application to foreign-flag cruise ships in some instances, when it requires removal of physical barriers, it would appear the rule is inapplicable to many other duties Title III might impose. We therefore reverse the decision of the Court of Appeals for the Fifth Circuit that the ADA is altogether inapplicable to foreign vessels, and we remand for further proceedings.

I

The respondent Norwegian Cruise Line Ltd. (NCL), a Bermuda corporation with a principal place of business in Miami, Florida, operates cruise ships that depart from, and return to, ports in the United States. The ships are essentially floating resorts. They provide passengers with staterooms or cabins, food, and entertainment. The cruise ships stop at different ports of call where passengers may disembark. Most of the passengers on these cruises are United States residents; under the terms and conditions of the tickets, disputes between passengers and NCL are to be governed by United States law; and NCL relies upon extensive advertising in the United States to promote its cruises and increase its revenues.

Despite the fact that the cruises are operated by a company based in the United States, serve predominantly United States residents, and are in most other respects United States-centered ventures, almost all of NCL's cruise ships are registered in other countries, flying so-called flags of convenience. The two NCL cruise ships that are the subject of the present litigation, the Norwegian Sea and the Norwegian Star, are both registered in the Bahamas.

The petitioners are disabled individuals and their companions who purchased tickets in 1998 or 1999 for round-trip cruises on the Norwegian Sea or the Norwegian Star, with departures from Houston, Texas. Naming NCL as the defendant, the petitioners filed a class action in the United States District Court for the Southern District of Texas on behalf of all persons similarly situated. They sought declaratory and injunctive relief under Title III of the ADA, which prohibits discrimination on the basis of disability. The petitioners asserted that cruise ships are covered both by Title III's prohibition on discrimination in places of "public accommodation," § 12182(a), and by its prohibition on discrimination in "specified public transportation services," § 12184(a). Both provisions require covered entities to make "reason-

able modifications in policies, practices, or procedures" to accommodate disabled individuals, §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A), and require removal of "architectural barriers, and communication barriers that are structural in nature," where such removal is "readily achievable," §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C).

The District Court held that, as a general matter, Title III applies to foreign-flag cruise ships in United States territorial waters. Civ. Action No. H–00–2649 (SD Tex., Sept. 10, 2002), App. to Pet. for Cert. 35a. The District Court found, however, that the petitioners' claims regarding physical barriers to access could not go forward because the agencies charged with promulgating architectural and structural guidelines for ADA compliance (the Architectural and Transportation Barriers Compliance Board, the Department of Transportation, and the Department of Justice) had not done so for cruise ships. In these circumstances, the court held, it is unclear what structural modifications NCL would need to make. *Id.*, at 36a–42a. The District Court granted NCL's motion to dismiss the barrier-removal claims, but denied NCL's motion with respect to all the other claims. *Id.*, at 47a.

The Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. It reasoned that our cases, particularly *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963), stand for the proposition that general statutes do not apply to foreign-flag vessels in United States territory absent a clear indication of congressional intent. 356 F. 3d, at 644 ("[T]o apply domestic law to foreign vessels entering United States waters, there must be present the affirmative intention of the Congress clearly expressed" (quoting *Benz*, *supra*, at 147; internal quotation marks omitted)); 356 F. 3d, at 646 (*Benz* and *McCulloch* "prohibit United States courts from applying domestic statutes to foreign-flagged ships without specific evidence

of congressional intent"). As Title III does not contain a specific provision mandating its application to foreign-flag vessels, the Court of Appeals sustained the District Court's dismissal of the petitioners' barrier-removal claims on this alternative ground and reversed the District Court on the remaining Title III claims. 356 F. 3d, at 650–651.

The action was ordered dismissed for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6), before extensive discovery. We cannot then discuss the specific allegations in much detail but must confine our opinion to the relevant general principles. (On November 24, 2004, the responsible agencies finally did issue draft guidelines for large passenger vessels and a Notice of Proposed Rulemaking. See 69 Fed. Reg. 69244, 69249. These developments are not dispositive of the legal question on which we granted certiorari, and we do not address how they might affect the ultimate resolution of the petitioners' claims.)

II

A

1

Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations, 42 U. S. C. § 12182(a), and public transportation services, § 12184(a). The general prohibitions are supplemented by various, more specific requirements. Entities that provide public accommodations or public transportation: (1) may not impose "eligibility criteria" that tend to screen out disabled individuals, §§ 12182(b)(2)(A)(i), 12184(b)(1); (2) must make "reasonable modifications in policies, practices, or procedures, when such modifications are necessary" to provide disabled individuals full and equal enjoyment, §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A); (3) must provide auxiliary aids and services to disabled individuals, §§ 12182(b)(2)(A)(iii), 12184(b)(2)(B); and (4) must remove architectural and structural barriers, or if barrier removal is

not readily achievable, must ensure equal access for the disabled through alternative methods, §§ 12182(b)(2)(A)(iv)–(v), 12184(b)(2)(C).

These specific requirements, in turn, are subject to important exceptions and limitations. Eligibility criteria that screen out disabled individuals are permitted when "necessary for the provision" of the services or facilities being offered, §§ 12182(b)(2)(A)(i), 12184(b)(1). Policies, practices, and procedures need not be modified, and auxiliary aids need not be provided, if doing so would "fundamentally alter" the services or accommodations being offered. §§ 12182(b)(2)(A)(ii)–(iii). Auxiliary aids are also unnecessary when they would "result in an undue burden," § 12182(b)(2)(A)(iii). As we have noted, moreover, the barrier-removal and alternative access requirements do not apply when these requirements are not "readily achievable," §§ 12182(b)(2)(A)(iv)–(v). Additionally, Title III does not impose nondiscrimination or accommodation requirements if, as a result, disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services," § 12182(b)(3).

Although the statutory definitions of "public accommodation" and "specified public transportation" do not expressly mention cruise ships, there can be no serious doubt that the NCL cruise ships in question fall within both definitions under conventional principles of interpretation. §§ 12181(7)(A)–(B), (I), (L), 12181(10). The Court of Appeals for the Fifth Circuit, nevertheless, held that Title III does not apply to foreign-flag cruise ships in United States waters because the statute has no clear statement or explicit text mandating coverage for these ships. This Court's cases, particularly *Benz* and *McCulloch*, do hold, in some circumstances, that a general statute will not apply to certain aspects of the internal operations of foreign vessels temporarily in United States waters, absent a clear statement. The

broad clear statement rule adopted by the Court of Appeals, however, would apply to every facet of the business and operations of foreign-flag ships. That formulation is inconsistent with the Court's case law and with sound principles of statutory interpretation.

2

This Court has long held that general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake. See *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 127 (1923) (holding that the general terms of the National Prohibition Act apply to foreign-flag ships in United States waters because "[t]here is in the act no provision making it [in]applicable" to such ships); *Uravic* v. *F. Jarka Co.*, 282 U. S. 234, 240 (1931) (holding that "general words" should be "generally applied" and that therefore there is "no reason for limiting the liability for torts committed [aboard foreign-flag ships in United States territory] when they go beyond the scope of discipline and private matters that do not interest the territorial power"). The general rule that United States statutes apply to foreign-flag ships in United States territory is subject only to a narrow exception. Absent a clear statement of congressional intent, general statutes may not apply to foreign-flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port. This qualification derives from the understanding that, as a matter of international comity, "all matters of discipline and all things done on board which affec[t] only the vessel or those belonging to her, and [do] not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged." *Wildenhus's Case*, 120 U. S. 1, 12 (1887). This exception to the usual presumption, however, does not extend beyond

matters of internal order and discipline. "[I]f crimes are committed on board [a foreign-flag vessel] of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws." *Ibid.*

The two cases in recent times in which the presumption against applying general statutes to foreign vessels' internal affairs has been invoked, *Benz* and *McCulloch*, concern labor relations. The Court held that the general terms of the National Labor Relations Act (NLRA), 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, did not govern the respective rights and duties of a foreign ship and its crew because the NLRA standards would interfere with the foreign vessel's internal affairs in those circumstances. These cases recognized a narrow rule, applicable only to statutory duties that implicate the internal order of the foreign vessel rather than the welfare of American citizens. *McCulloch*, 372 U. S., at 21 (holding that "the law of the flag state ordinarily governs the *internal affairs* of a ship" (emphasis added)); see also *Benz*, 353 U. S., at 146–147. The Court held the NLRA inapplicable to labor relations between a foreign vessel and its foreign crew not because foreign ships are generally exempt from the NLRA, but because the particular application of the NLRA would interfere with matters that concern only the internal operations of the ship. In contrast, the Court held that the NLRA is fully applicable to labor relations between a foreign vessel and American longshoremen because this relationship, unlike the one between a vessel and its own crew, does not implicate a foreign ship's internal order and discipline. *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 198–201 (1970).

This narrow clear statement rule is supported by sound principles of statutory construction. It is reasonable to presume Congress intends no interference with matters that are primarily of concern only to the ship and the foreign state

in which it is registered. It is also reasonable, however, to presume Congress does intend its statutes to apply to entities in United States territory that serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility of the United States, even if those entities happen to be foreign-flag ships.

Cruise ships flying foreign flags of convenience offer public accommodations and transportation services to over 7 million United States residents annually, departing from and returning to ports located in the United States. Large numbers of disabled individuals, many of whom have mobility impairments that make other kinds of vacation travel difficult, take advantage of these cruises or would like to do so. To hold there is no Title III protection for disabled persons who seek to use the amenities of foreign cruise ships would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled. § 12101. The clear statement rule adopted by the Court of Appeals for the Fifth Circuit, moreover, would imply that other general federal statutes—including, for example, Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a *et seq.*—would not apply aboard foreign cruise ships in United States waters. A clear statement rule with this sweeping application is unlikely to reflect congressional intent.

The relevant category for which the Court demands a clear congressional statement, then, consists not of all applications of a statute to foreign-flag vessels but only those applications that would interfere with the foreign vessel's internal affairs. This proposition does not mean the clear statement rule is irrelevant to the ADA, however. If Title III by its terms does impose duties that interfere with a foreign-flag cruise ship's internal affairs, the lack of a clear congressional statement can mean that those specific applications of Title III are precluded. On remand, the Court of Appeals may need to consider which, if any, Title III requirements interfere

with the internal affairs of foreign-flag vessels. As we will discuss further, however, Title III's own limitations and qualifications may make this inquiry unnecessary.

B

1

The precise content of the category "internal affairs" (or, as it is variously denoted in the case law, "internal order" or "internal operations") is difficult to define with precision. There is, moreover, some ambiguity in our cases as to whether the relevant category of activities is restricted to matters that affect only the internal order of the ship when there is no effect on United States interests, or whether the clear statement rule further comes into play if the predominant effect of a statutory requirement is on a foreign ship's internal affairs but the requirement also promotes the welfare of United States residents or territory. We need not attempt to define the relevant protected category with precision. It suffices to observe that the guiding principles in determining whether the clear statement rule is triggered are the desire for international comity and the presumed lack of interest by the territorial sovereign in matters that bear no substantial relation to the peace and tranquility of the port.

It is plain that Title III might impose any number of duties on cruise ships that have nothing to do with a ship's internal affairs. The pleadings and briefs in this case illustrate, but do not exhaust, the ways a cruise ship might offend such a duty. The petitioners allege NCL charged disabled passengers higher fares and required disabled passengers to pay special surcharges, Plaintiffs' First Amended Original Complaint in No. H–00–2649 (SD Tex.), ¶ 32, App. 15 (hereinafter Complaint); Brief for Petitioners 17–20; maintained evacuation programs and equipment in locations not accessible to disabled individuals, Complaint ¶ 19, App. 12; Brief for Petitioners 21; required disabled individuals, but

not other passengers, to waive any potential medical liability and to travel with a companion, *id.*, at 8, 17–18; and reserved the right to remove from the ship any disabled individual whose presence endangers the "comfort" of other passengers, *id.*, at 8, 20. The petitioners also allege more generally that NCL "failed to make reasonable modifications in policies, practices, and procedures" necessary to ensure the petitioners' full enjoyment of the services NCL offered. Complaint ¶ 30, App. 15. These are bare allegations, and their truth is not conceded. We express no opinion on the factual support for those claims. We can say, however, that none of these alleged Title III violations implicate any requirement that would interfere with the internal affairs and management of a vessel as our cases have employed that term.

At least one subset of the petitioners' allegations, however, would appear to involve requirements that might be construed as relating to the internal affairs of foreign-flag cruise ships. These allegations concern physical barriers to access on board. For example, according to the petitioners, most of the cabins on NCL's cruise ships, including the most attractive cabins in the most desirable locations, are not accessible to disabled passengers. Brief for Petitioners 17–18; Complaint ¶ 16, App. 11. The petitioners also allege that the ships' coamings—the raised edges around their doors—make many areas of the ships inaccessible to mobility-impaired passengers who use wheelchairs or scooters. Brief for Petitioners 24. Removal of these and other access barriers, the petitioners suggest, may be required by Title III's structural barrier-removal requirement, §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C).

Although these physical barriers affect the passengers as well as the ship and its crew, the statutory requirement could mandate a permanent and significant alteration of a physical feature of the ship—that is, an element of basic ship design

and construction. If so, these applications of the barrier-removal requirement likely would interfere with the internal affairs of foreign ships. A permanent and significant modification to a ship's physical structure goes to fundamental issues of ship design and construction, and it might be impossible for a ship to comply with all the requirements different jurisdictions might impose. The clear statement rule would most likely come into play if Title III were read to require permanent and significant structural modifications to foreign vessels. It is quite a different question, however, whether Title III would require this. The Title III requirements that might impose permanent and substantial changes to a ship's architecture and design, are, like all of Title III's requirements, subject to the statute's own specific limitations and qualifications. These limitations may make resort to the clear statement rule unnecessary.

2

Title III requires barrier removal if it is "readily achievable," § 12182(b)(2)(A)(iv). The statute defines that term as "easily accomplishable and able to be carried out without much difficulty or expense," § 12181(9). Title III does not define "difficulty" in § 12181(9), but use of the disjunctive—"easily accomplishable and able to be carried out without much difficulty or expense"—indicates that it extends to considerations in addition to cost. Furthermore, Title III directs that the "readily achievable" determination take into account "the impact . . . upon the operation of the facility," § 12181(9)(B).

Surely a barrier-removal requirement under Title III that would bring a vessel into noncompliance with the International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, [1979–1980] 32 U. S. T. 47, T. I. A. S. No. 9700, or any other international legal obligation, would create serious difficulties for the vessel and would have a substantial im-

pact on its operation, and thus would not be "readily achievable." This understanding of the statute, urged by the United States, is eminently reasonable. Brief as *Amicus Curiae* 27–28; ADA Title III Technical Assistance Manual III–1.2000(D) (Supp. 1994), available at http://www.usdoj.gov/crt/ada/taman3up.html (as visited May 31, 2005, and available in Clerk of Court's case file); 56 Fed. Reg. 45600 (1991). If, moreover, Title III's "readily achievable" exemption were not to take conflicts with international law into account, it would lead to the anomalous result that American cruise ships are obligated to comply with Title III even if doing so brings them into noncompliance with SOLAS, whereas foreign ships—which unlike American ships have the benefit of the internal affairs clear statement rule—would not be so obligated. Congress could not have intended this result.

It is logical and proper to conclude, moreover, that whether a barrier modification is "readily achievable" under Title III must take into consideration the modification's effect on shipboard safety. A separate provision of Title III mandates that the statute's nondiscrimination and accommodation requirements do not apply if disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services," § 12182(b)(3). This reference is to a safety threat posed by a disabled individual, whereas here the question would be whether the structural modification itself may pose the safety threat. It would be incongruous, nevertheless, to attribute to Congress an intent to require modifications that threaten safety to others simply because the threat comes not from the disabled person but from the accommodation itself. The anomaly is avoided by concluding that a structural modification is not readily achievable within the meaning of § 12181(9) if it would pose a direct threat to the health or safety of others.

3

Because Title III does not require structural modifications that would conflict with international legal obligations or pose any real threat to the safety of the crew or other passengers, it may well follow—though we do not decide the question here—that Title III does not require any permanent and significant structural modifications that interfere with the internal affairs of any cruise ship, foreign flag or domestic. If that is indeed the case, recourse to the clear statement rule would not be necessary.

Cases may arise, however, where it is prudent for a court to turn first to the internal affairs clear statement rule rather than deciding the precise scope and operation of the statute. Suppose, for example, it is a difficult question whether a particular Title III barrier-removal requirement is readily achievable, but the requirement does entail a permanent and significant structural modification, interfering with a foreign ship's internal affairs. In that case a court sensibly could invoke the clear statement rule without determining whether Title III actually imposes the requirement. On the other hand, there may be many cases where it is not obvious that a particular physical modification relates to a vessel's basic architecture and construction, but it is clear the modification would conflict with SOLAS or some other international legal obligation. In those cases, a court may deem it appropriate to hold that the physical barrier modification in question is not readily achievable, without resort to the clear statement rule.

III

A

In light of the preceding analysis, it is likely that under a proper interpretation of "readily achievable" Title III would impose no requirements that interfere with the internal affairs of foreign-flag cruise ships. If Title III did impose a duty that required cruise ships to make permanent and sig-

nificant structural modifications that did not conflict with international law or threaten safety, or if the statute otherwise interfered with a foreign ship's internal affairs, the clear statement rule recognized in *Benz* and *McCulloch* would come into play at that point. The Title III requirement in question, however, would still apply to domestic cruise ships, and Title III requirements having nothing to do with internal affairs would continue to apply to domestic and foreign ships alike.

This application-by-application use of the internal affairs clear statement rule is consistent with how the rule has traditionally operated. In *Benz* and *McCulloch*, the Court concluded that the NLRA did not apply to labor relations between a foreign-flag ship and its foreign crew because of interference with the foreign ships' internal affairs. In *Ariadne Shipping*, however, the Court held that the NLRA does apply to labor relations between a foreign-flag ship and American longshoremen. *Ariadne Shipping* acknowledged the clear statement rule invoked in *Benz* and *McCulloch* but held that the "considerations that informed the Court's construction of the statute in [those cases] are clearly inapplicable" to the question whether the statute applies to foreign ships' labor relations with American longshoremen. 397 U. S., at 199. *Ariadne Shipping* held that the longshoremen's "short-term, irregular and casual connection with the [foreign] vessels plainly belied any involvement on their part with the ships' 'internal discipline and order.'" *Id.*, at 200. Therefore, application of the NLRA to foreign ships' relations with American longshoremen "would have threatened no interference in the internal affairs of foreign-flag ships." *Ibid.* If the clear statement rule restricts some applications of the NLRA to foreign ships (*e. g.*, labor relations with the foreign crew), but not others (*e. g.*, labor relations with American longshoremen), it follows that the case-by-case application is also required under Title III of the ADA. The rule, where it is even necessary to invoke it, would restrict

some applications of Title III to foreign ships (*e. g.*, certain structural barrier-modification requirements), but not others (*e. g.*, the prohibition on discriminatory ticket pricing).

The internal affairs clear statement rule is an implied limitation on otherwise unambiguous general terms of the statute. It operates much like the principle that general statutes are construed not to apply extraterritorially, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 260 (1991), or the rule that general statutes are presumed not to impose monetary liability on nonconsenting States, *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985). Implied limitation rules avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter. In these instances, the absence of a clear congressional statement is, in effect, equivalent to a statutory qualification saying, for example, "Notwithstanding any general language of this statute, this statute shall not apply extraterritorially"; or " . . . this statute shall not abrogate the sovereign immunity of nonconsenting States"; or " . . . this statute does not regulate the internal affairs of foreign-flag vessels." These clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation. An all-or-nothing approach, under which a statute is altogether inapplicable if but one of its specific applications trenches on the domain protected by a clear statement rule, would convert the clear statement rule from a principle of interpretive caution into a trap for an unwary Congress. If Congress passes broad legislation that has some applications that implicate a clear statement rule—say, some extraterritorial applications, or some applications that would regulate foreign ships' internal affairs—an all-or-nothing approach would require that the entire statute, or some arbitrary set of applications larger than the domain protected by the clear statement rule, would be nullified. We decline to adopt that posture.

B

Our holding that the clear statement rule operates only when a ship's internal affairs are affected does not implicate our holding in *Clark* v. *Martinez*, 543 U. S. 371 (2005). *Martinez* held that statutory language given a limiting construction in one context must be interpreted consistently in other contexts, "even though other of the statute's applications, standing alone, would not support the same limitation." *Id.*, at 380. This was simply a rule of consistent interpretation of the statutory words, with no bearing on the implementation of a clear statement rule addressed to particular statutory applications.

The statute in *Martinez*, 8 U. S. C. § 1231(a)(6), authorized detention of aliens pending their removal. In *Zadvydas* v. *Davis*, 533 U. S. 678, 696–699 (2001), the Court had interpreted this statute to impose time limits on detention of aliens held for certain reasons stated in the statute. The Court held that an alternative interpretation, one allowing indefinite detention of lawfully admitted aliens, would raise grave constitutional doubts. Having determined the meaning of § 1231(a)(6)'s text in *Zadvydas*, we were obliged in *Martinez* to follow the same interpretation even in a context where the constitutional concerns were not present. *Martinez*, 543 U. S., at 377–381. As already made clear, the question was one of textual interpretation, not the scope of some implied exception. The constitutional avoidance canon simply informed the choice among plausible readings of § 1231(a)(6)'s text: "The canon of constitutional avoidance," *Martinez* explained, "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Id.*, at 385 (emphasis deleted).

Martinez gives full respect to the distinction between rules for resolving textual ambiguity and implied limitations on otherwise unambiguous text. Indeed, *Martinez* relies on

the distinction to reconcile its holding with two cases which did involve a clear statement rule, *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533 (2002), and *Jinks* v. *Richland County*, 538 U. S. 456 (2003). *Raygor* had held that the tolling provision in the supplemental jurisdiction statute, 28 U. S. C. § 1367(d), does not apply to nonconsenting States because the statute lacks the required clear statement that States are within its coverage. Later, in *Jinks*, we held that the § 1367(d) tolling provision does apply to suits against counties. The counties were not protected by a clear statement rule analogous to the one applicable to States. See *Martinez*, 543 U. S., at 383, and n. 6; see also *id.*, at 393–394 (THOMAS, J., dissenting). "This progression of decisions," we held in *Martinez*, "does not remotely establish that § 1367(d) has two different meanings, equivalent to the unlimited-detention/limited-detention meanings of § 1231(a)(6) urged upon us here. They hold that the single and unchanging disposition of § 1367(d) . . . does not apply to claims against States that have not consented to be sued in federal court." *Id.*, at 383. The distinction between *Zadvydas* and *Martinez*, on the one hand, and *Raygor* and *Jinks*, on the other, is the distinction between a canon for choosing among plausible meanings of an ambiguous statute and a clear statement rule that implies a special substantive limit on the application of an otherwise unambiguous mandate.

The internal affairs clear statement rule is an implied limitation rule, not a principle for resolving textual ambiguity. Our cases, then, do not compel or permit the conclusion that if any one application of Title III might interfere with a foreign-flag ship's internal affairs, Title III is inapplicable to foreign ships in every other instance.

* * *

The Court of Appeals for the Fifth Circuit held that general statutes do not apply to foreign-flag ships in United

States waters. This Court's cases, however, stand only for the proposition that general statutes are presumed not to impose requirements that would interfere with the internal affairs of foreign-flag vessels. Except insofar as Title III regulates a vessel's internal affairs—a category that is not always well defined and that may require further judicial elaboration—the statute is applicable to foreign ships in United States waters to the same extent that it is applicable to American ships in those waters.

Title III's own limitations and qualifications prevent the statute from imposing requirements that would conflict with international obligations or threaten shipboard safety. These limitations and qualifications, though framed in general terms, employ a conventional vocabulary for instructing courts in the interpretation and application of the statute. If, on remand, it becomes clear that even after these limitations are taken into account Title III nonetheless imposes certain requirements that would interfere with the internal affairs of foreign ships—perhaps, for example, by requiring permanent and substantial structural modifications—the clear statement rule would come into play. It is also open to the court on remand to consider application of the clear statement rule at the outset if, as a prudential matter, that appears to be the more appropriate course.

We reverse the judgment of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I agree with the Court's holding that Title III of the Americans with Disabilities Act of 1990 covers cruise ships, *ante,* at 129, and allows them to resist modifications "that would conflict with international legal obligations," *ante,* at 137 (plurality opinion). I therefore join Parts I, II–A–1,

and II–B–2 of the Court's opinion. I would give no wider berth, however, to the "internal affairs" clear statement rule in determining Title III's application to respondent's cruise ships, the Norwegian Sea and Norwegian Star. But see *ante*, at 137. That rule, as I understand it, derives from, and is moored to, the broader guide that statutes "should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 815 (1993) (SCALIA, J., dissenting); see also *id.*, at 816 (describing *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963), as applying this principle); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804). Title III is properly read to avoid such conflict, but should not be hemmed in where there is no potential for international discord.[1]

The first of the modern cases to address the application of a domestic statute to a foreign-flag ship in U. S. waters, *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), did not resort to the tag, "internal affairs" rule, to explain the Court's decision.[2] *Benz* held that the Labor Management Relations Act did not reach relations between "a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation." *Id.*, at 142. As we concluded in *Benz*, before reading our law to "run interference in such a delicate field of international relations," "where the possibilities of international discord are so evident and retaliative action so certain," the Court should await Congress' clearly expressed instruction. *Id.*, at 147.

---

[1] Were a clear statement rule in order, I would agree with the plurality's application-by-application approach.

[2] Only in a footnote describing a National Labor Relations Board decision did the Court make a synonymous reference to the "internal economy of a vessel of foreign registry and ownership." *Benz*, 353 U. S., at 143, n. 5.

Six years later, in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963), the Court relied on *Benz* to hold that the National Labor Relations Act does not regulate the representation of alien seamen recruited in Honduras to serve aboard vessels under Honduran flags. Applying our law "to the internal management and affairs" of the vessels in question, we observed, *McCulloch*, 372 U. S., at 20, would produce a "head-on collision" with the regulatory regime installed under the Honduran labor code, *id.*, at 21. "[S]uch highly charged international circumstances," we said, called for adherence to the venerable interpretive guide that "'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Ibid.* (quoting *Schooner Charming Betsy*, 2 Cranch, at 118). Cf. *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 200 (1970) (applying U. S. law to foreign ships' labor relations with longshoreworkers employed at U. S. ports is proper because doing so "would . . . threate[n] no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law").

The noninterference principle underlying the internal affairs clear statement rule is served in this case by the Court's interpretation of Title III's "readily achievable" provision, 42 U. S. C. § 12182(b)(2)(A)(iv). See *ante*, at 135–136. Construing this language to allow ships to resist modifications "that would conflict with international legal obligations," *ante*, at 137, the plurality ensures that Title III will not provoke "international discord" of the kind *Benz* and *McCulloch* sought to avoid. I agree with this interpretation, but would create no larger space for the internal affairs rule.

The plurality, however, suggests that the clear statement rule has a further office: It may block structural modifications prompted by Title III that are "readily achievable"—because they do not conflict with international legal obligations—but nonetheless "interfer[e] with a foreign ship's

internal affairs." *Ante*, at 137. I disagree with this conception of the rule. In positing an extended application of the internal affairs rule, the plurality cuts the rule loose from its foundation. As *Benz* and *McCulloch* demonstrate, the clear statement rule is an interpretive principle counseling against construction of a statute in a manner productive of international discord. When international relations are not at risk, and there is good reason to apply our own law, asserted internal affairs of a ship should hold no greater sway than asserted management prerogatives of a landlocked enterprise.[3]

As the plurality rightly notes, Title III is a broad remedial statute designed to protect persons with disabilities in a variety of activities and settings. See *ante*, at 132; § 12101(b). The United States has a strong interest in ensuring that U. S. resident cruise passengers enjoy Title III's protections on both domestic and foreign ships. See § 12101; Brief for United States as *Amicus Curiae* 10.[4] Once conflicts with international legal obligations are avoided, I see no reason to demand a clearer congressional statement that Title III reaches the vessels in question, ships that regularly sail to and from U. S. ports and derive most of their income from U. S. passengers. In sum, I agree that § 12182(b)(2)(A)(iv), properly read, does not require shipowners to make modifications that would conflict with international legal obligations. But I would attribute to the internal affairs clear statement rule no further limitation on Title III's governance in this case.

---

[3] One could hardly anticipate that, absent conflict with international legal obligations, the application of Title III sought in this case would generate a "storm of diplomatic protest." *Id.*, at 146 (noting "storm of diplomatic protest" against proposal to apply U. S. law to prohibit advance payments by a foreign vessel to foreign seamen in foreign ports).

[4] As the Court notes, the ships at issue here "are operated by a company based in the United States, serve predominantly United States residents, and are in most other respects United States-centered ventures." *Ante*, at 126. Merchant ships sailing between U. S. and foreign ports would present a different question.

JUSTICE THOMAS, concurring in part, dissenting in part, and concurring in the judgment in part.

When a law regulates the internal order of ships, Congress must clearly express its intent to apply the law to foreign-flag ships. *Ante*, at 130–132 (plurality opinion); *post*, at 149–150 (SCALIA, J., dissenting). I agree with JUSTICE SCALIA that this rule applies to any structural changes to a ship that Title III of the Americans with Disabilities Act of 1990 (ADA) might require, for such changes to a ship's physical structure pertain to its internal affairs. *Post*, at 151 (dissenting opinion); see *ante*, at 134–135 (plurality opinion). I further agree with JUSTICE SCALIA that this clear statement rule applies once the possibility, rather than the certainty, of international discord arises; and that the clear statement rule therefore does not require or permit the kind of express conflicts-of-law analysis that the plurality demands. *Post*, at 153–155 (dissenting opinion); *ante*, at 135–136 (majority opinion), 137 (plurality opinion). Moreover, I do not think that courts should (as the plurality permits) employ the rule selectively, applying it when "prudent" but declining to apply it when "appropriate." *Ante*, at 137 (plurality opinion); see also *post*, at 158, n. 8 (SCALIA, J., dissenting); *Small* v. *United States*, 544 U. S. 385, 405 (2005) (THOMAS, J., dissenting) ("Whatever the utility of canons as guides to congressional intent, they are useless when modified in ways that Congress could never have imagined"). For those reasons, I join Part I–A of JUSTICE SCALIA's dissent. While I conclude that the rule applies to certain aspects of Title III, I agree with the plurality that it does not require an "all-or-nothing approach." *Ante*, at 139. Consequently, those applications of Title III that do not pertain to internal affairs apply to foreign-flag vessels. For that reason, I join Part III–A of the plurality opinion.

I reach this result, however, only because I continue to reject the "lowest common denominator" principle the Court articulated for the first time in *Clark* v. *Martinez*, 543 U. S.

371 (2005). See *id.*, at 395–397 (THOMAS, J., dissenting). The plurality, by contrast, accepts *Clark*. Moreover, it claims that applying Title III of the ADA to matters that are not within the realm of a ship's internal order is consistent with *Clark*. The plurality's efforts to distinguish *Clark* are implausible.

The plurality says that today's case differs from *Clark* because it invokes a clear statement rule to interpret unambiguous text. According to the plurality, *Clark* concerned the application of a previously adopted limiting construction of ambiguous text, which this Court imposed to ameliorate unrelated constitutional doubts. *Ante*, at 140–141. As an initial matter, however, the statute at issue in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), and *Clark* was not ambiguous. *Clark*, *supra*, at 402–403 (THOMAS, J., dissenting). Even assuming for the sake of argument that it was ambiguous, the distinction the plurality draws has no basis in *Clark*. In *Clark*, this Court addressed the period of detention 8 U. S. C. § 1231(a)(6) authorized for inadmissible aliens. This was a question left open by *Zadvydas*, *supra*, which had addressed the period of detention under the same statute but with respect to a different class of aliens—those who had been admitted into the country. In *Zadvydas*, this Court had concluded that the possibility of indefinite detention of admitted aliens raised significant constitutional doubts and, in light of those doubts, it limited the Attorney General's power to detain admitted aliens. 533 U. S., at 689–690, 699. Section 1231(a)(6) does not distinguish between the two classes of aliens. Thus, this Court in *Clark* concluded it was compelled to apply that same construction, which was warranted only by the specific constitutional concerns arising for admitted aliens, to the unadmitted aliens before it. 543 U. S., at 378. *Clark*'s conclusion stemmed from the narrowing construction adopted in *Zadvydas*, not the type of rule or canon that gave rise to that construction. 543 U. S., at 377–378.

The plurality's reasoning cannot be squared with *Clark*'s "lowest common denominator" principle. Under *Clark*, "[t]he lowest common denominator, as it were, must govern." *Id.*, at 380. Just as in *Zadvydas* and *Clark*, this Court is called upon to interpret the same statutory text with respect to two different classes of cases—those that implicate the internal affairs of a vessel and those that do not. And just like the statute at issue in *Zadvydas* and *Clark*, Title III "applies without differentiation" to the internal and external affairs of foreign-flag vessels, as well as the internal and external affairs of domestic-flag ships. 543 U. S., at 378. Thus, the limiting construction of Title III's definitions excluding foreign cruise ships from those definitions must govern *all* applications of the statute, not just those applications that pertain to internal affairs. According to *Clark*, the Court may not narrow Title III on a case-by-case basis, depending on whether a particular application of Title III interferes with a ship's internal order. In fact, it may not apply Title III to any ship or, for that matter, any entity at all, because Title III does not distinguish between any of the covered entities. This demonstrates why the principle *Clark* established is flawed.

Today's decision, then, cabins the *Clark* principle to apply only when the canon of constitutional avoidance is invoked to choose among ambiguous readings of a statute. But even here *Clark* will continue to make mischief. As I explained in *Clark*, the lowest common denominator principle requires courts to search out a single hypothetical constitutionally doubtful case to limit a statute's terms in the wholly different case actually before the court, lest the court fail to adopt a reading of the statute that reflects the lowest common denominator. *Id.*, at 400 (dissenting opinion). This requires a reverse-*Salerno* analysis that upends our facial challenge requirements. See *Clark*, *supra*, at 381–382; see also *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (for a facial challenge to succeed, there must be no circumstance in which

the statute is constitutional). For this and other reasons I have explained, the *Clark* analysis allows much havoc to be wrought from the canon of constitutional avoidance. See *Clark*, *supra*, at 395–401 (dissenting opinion).

In sum, I believe that Title III of the ADA, insofar as it requires structural changes, lacks a sufficiently clear statement that it applies to the internal affairs of foreign vessels. In my view the clear statement rule does not render Title III entirely inapplicable to foreign vessels; instead, Title III applies to foreign ships only to the extent to which it does not bear on their internal affairs. I therefore would remand for consideration of those Title III claims that do not pertain to the structure of the ship. Accordingly, I concur in Part III–A of the plurality opinion, join Part I–A of JUSTICE SCALIA's dissent, and concur in the judgment in part.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, and with whom JUSTICE THOMAS joins as to Part I–A, dissenting.

I respectfully dissent. The plurality correctly recognizes that Congress must clearly express its intent to apply its laws to foreign-flag ships when those laws interfere with the ship's internal order. Its attempt to place Title III of the Americans with Disabilities Act of 1990 (ADA) outside this rule through creative statutory interpretation and piecemeal application of its provisions is unsupported by our case law. Title III plainly affects the internal order of foreign-flag cruise ships, subjecting them to the possibility of conflicting international obligations. I would hold that, since there is no clear statement of coverage, Title III does not apply to foreign-flag cruise ships.

I

A

As the plurality explains, where a law would interfere with the regulation of a ship's internal order, we require a clear statement that Congress intended such a result. See

ante, at 130. This rule is predicated on the "rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 21 (1963), and is designed to avoid "the possibilit[y] of international discord," *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 147 (1957); see also *McCulloch*, *supra*, at 19.

The clear-statement rule finds support not only in *Benz* and *McCulloch*, but in cases like *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 128–129 (1923), where we held that the National Prohibition Act, 41 Stat. 305, forbade foreign-flag ships from carrying or serving alcohol in United States territorial waters. Though we did not say so expressly in that case, prohibiting the carrying and serving of alcohol in United States waters cannot be said to affect the "internal order" of the ship, because it does not in any way affect the operation or functioning of the craft.[1] Similarly, in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), and *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U. S. 306 (1970), we did *not* employ a clear-statement rule in determining whether foreign seamen injured aboard foreign-flag ships could recover under the Jones Act, 41 Stat. 1007, 46 U. S. C. App. § 688. We distinguished these cases in *McCulloch*, explaining that a clear statement is not required "in different contexts, such as the Jones Act . . . where *the pervasive regulation of the internal order of a ship may not be present.*" 372 U. S., at 19, n. 9 (emphasis added).[2]

---

[1] The plurality also appears to have found that the National Prohibition Act contained a clear statement of intent to reach foreign-flag vessels, because the Act had been amended to state that it applied to "all territory subject to [the] jurisdiction" of the United States. *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 127 (1923) (internal quotation marks omitted).

[2] The plurality intimates that the clear-statement rule might be inapplicable in situations where, as here, the foreign-flag ships have a number of contacts with the United States. See *ante*, at 131–132. *McCulloch*, 372 U. S., at 19, expressly rejected this approach, explaining that any attempt to weigh the ship's contacts with the United States "would inevitably lead

As the plurality concedes, *ante*, at 134, the structural modifications that Title III of the ADA requires under its barrier-removal provisions, see 42 U. S. C. §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C), would plainly affect the ship's "internal order." Rendering exterior cabins handicapped accessible, changing the levels of coamings, and adding public restrooms—the types of modifications petitioners request—would require alteration of core physical aspects of the ship, some of which relate to safety. (Safety has, under international law, traditionally been the province of a ship's flag state.) This is quite different from prohibiting alcohol in United States waters or imposing tort liability for injuries sustained on foreign ships in port—the laws at issue in *Cunard* and the Jones Act cases. Those restrictions affected the ship only in limited circumstances, and in ways ancillary to its operation at sea. A ship's design and construction, by contrast, are at least as integral to the ship's operation and functioning as the bargaining relationship between shipowner and crew at issue in *Benz* and *McCulloch*.

Moreover, the structural changes petitioners request would be permanent. Whereas a ship precluded from serving or carrying alcohol in United States waters may certainly carry and serve alcohol on its next trip from Italy to Greece, structural modifications made to comply with American laws cannot readily be removed once the ship leaves our waters and ceases to carry American passengers. This is again much like the situation presented in *Benz* and *McCulloch*, where the application of American labor laws would have continued to govern contracts between foreign shipowners and their foreign crews well beyond their time in our waters.

The purpose of the "internal order" clear-statement requirement is to avoid casually subjecting oceangoing vessels to laws that pose obvious risks of conflict with the laws of the

---

to embarrassment in foreign affairs and [would] be entirely infeasible in actual practice."

ship's flag state, the laws of other nations, and international obligations to which the vessels are subject. That structural modifications required under Title III qualify as matters of "internal order" is confirmed by the fact that they may already conflict with the International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, [1979–1980] 32 U. S. T. 47, T. I. A. S. No. 9700. That treaty, which establishes the safety standards governing the design and maintenance of oceangoing ships, has been ratified by 155 countries. See International Maritime Organization, Summary of Status of Conventions, http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (all Internet materials as visited June 2, 2005, and available in Clerk of Court's case file). The ADA Accessibility Guidelines (ADAAG) Review Advisory Committee—the Government body Congress has charged with formulating the Title III barrier-removal guidelines—has promulgated rules requiring at least one accessible means of egress to be an elevator, whereas SOLAS, which requires at least two means of escape, does not allow elevators to be one of them. See Passenger Vessel Access Advisory Committee, Final Report: Recommendations for Accessibility Guidelines for Passenger Vehicles, ch. 13, pt. I (Dec. 2000), http://www.access-board.gov/news/pvaac-rept.htm (hereinafter PVAAC Report) (explaining potential conflicts between ADAAG regulations and SOLAS). The ADAAG rules set coaming heights for doors required to be accessible at one-half inch; SOLAS sets coaming heights for some exterior doors at three to six inches to ensure that those doors will be watertight. *Ibid.*

Similar inconsistencies may exist between Title III's structural requirements and the disability laws of other countries. The United Kingdom, for example, is considering the promulgation of rules to govern handicapped accessibility to passenger vehicles, including cruise ships. The rules being considered currently include exact specifications, down to the centimeter, for the height of handrails, beds, and elec-

trical switches, and the width of door openings. See Disabled Persons Transport Advisory Committee, The design of large passenger ships and passenger infrastructure: Guidance on meeting the needs of disabled people (Nov. 2000), http://www.dptac.gov.uk/pubs/guideship/pdf/dptacbroch.pdf. Though many of these regulations may be compatible with Title III, it is easy to imagine conflicts arising, given the detailed nature of ADAAG's regulations. See PVAAC Report, chs. 1–11. As we have previously noted, even this "*possibility* of international discord" with regard to a seagoing vessel's internal order, *McCulloch*, 372 U. S., at 21 (emphasis added), gives rise to the presumption of noncoverage absent clear statement to the contrary.

The Court asserts that Title III would not produce conflicts with the requirements of SOLAS and would not compromise safety concerns. This argument comes at the expense of an expansive *en passant* interpretation of the exceptions to the barrier-removal requirements of Title III—which interpretation will likely have more significant nationwide effects than the Court's holding concerning Title III's application to foreign-flag vessels. Assuming, however, that the argument is even correct,[3] it is entirely beside the point. It has never been a condition for application of the foreign-flag clear-statement rule that an actual conflict with foreign or international law be established—any more than that has been a condition for application of the clear-statement rule regarding extraterritorial effect of congres-

[3] This is by no means clear. Title III defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U. S. C. § 12181(9). It is, at best, ambiguous whether a barrier removal can be rendered not "easily *accomplishable*" or not "able to be *carried out* without much difficulty" by factors extrinsic to the removal itself. Conflict of an easily altered structure with foreign laws seems to me not much different from the tendency of an easily altered structure to deter customers. That is why, as suggested in text, the Court's unexpected Title III holding may be the most significant aspect of today's foreign-flag decision.

sional enactments. The reason to apply the rule here is that the structure of a ship pertains to the ship's internal order, which is a matter presumably left to the flag state unless Congress indicates otherwise. The basis for that presumption of congressional intent is principally (though perhaps not exclusively) that subjecting such matters to the commands of various jurisdictions raises the *possibility* (not necessarily the certainty) of conflict among jurisdictions and with international treaties. Even if the Court could, by an imaginative interpretation of Title III, demonstrate that in this particular instance there would be no conflict with the laws of other nations or with international treaties,[4] it would remain true that a ship's structure is preeminently part of its internal order; and it would remain true that subjecting ship structure to multiple national requirements invites conflict. *That* is what triggers application of the clear-statement rule.

Safety concerns—and specifically safety as related to ship structure—are traditionally the responsibility of the flag state. Which is to say they are regarded as part of the ship's internal order. And even if Title III makes ample provision for a safety exception to the barrier-removal requirements, what *it* considers necessary for safety is not necessarily what other nations or international treaties consider necessary.

The foregoing renders quite unnecessary the Court's worry that Title III might require American cruise ships to adhere to Congress's prescription in violation of SOLAS. See *ante*, at 135–136. If and when that possibility presents itself, the Court remains free to do what it does here: to interpret Title III so as to avoid any conflict. But the avail-

---

[4] The Court, of course, has not even shown that Title III is consistent with the laws of the cruise ships' flag state; much less has it undertaken the Herculean task—which its theory of presumed coverage by domestic law would require—of showing Title III consistent with the laws of all the cruise ships' ports of call.

ability of such an interpretation has no bearing upon whether the structural features of an oceangoing vessel are part of its internal order. (I must observe, however, that it seems much more plausible that Congress intended to require American cruise ships to adhere to Title III regardless of SOLAS, than that—what the Court apparently believes—Congress intended Title III to be interpreted with an eye to SOLAS.) In any event, the application of Title III to oceangoing vessels under American flag is not at issue here. I would therefore hold that, because Title III's barrier-removal provisions clearly have the possibility of subjecting foreign-flag ships to conflicting international obligations, no reading of Title III—no matter how creative—can alter the presumption that Title III does not apply to foreign-flag ships without a clear statement from Congress.[5]

B

The plurality holds that, even "[i]f Title III did impose a duty that required [foreign-flag] cruise ships to make permanent and significant structural modifications[,] or . . . otherwise interfered with a foreign ship's internal affairs, . . . Title III requirements having nothing to do with internal affairs would continue to apply to domestic and foreign ships alike." *Ante*, at 137–138. I disagree. Whether or not Title III's prescriptions regarding such matters implicate the "internal order" of the ship, they still relate to the ships' maritime operations and are part of the same Title III.[6] The requirements of that enactment either apply to foreign-flag ships or

[5] Of course this clear-statement rule would not apply to the onshore operations of foreign cruise companies, which would be treated no differently from the operations of other foreign companies on American soil.

[6] This includes the pricing and ticketing policies, which are intimately related to the ships' maritime operations (and perhaps to internal order) because they are designed to defray the added cost and provide the added protection that the cruise-ship companies deem necessary for safe transport of disabled passengers.

they do not. It is not within our power to design a statute some of whose provisions apply to foreign-flag ships and other of whose provisions do not—any more than it is within our power to prescribe that the statute applies to foreign-flag cruise ships 60% of whose passengers are United States citizens and does not apply to other foreign-flag cruise ships.

The plurality's assertion that those portions of Title III that do *not* implicate a ship's internal order apply to foreign-flag ships displays a confusion between a principle of interpretation based upon a true-to-fact presumption of congressional intent, and a court-made rule. The plurality seems to forget that it is a matter of determining whether Congress *in fact intended* that its enactment cover foreign-flag ships. To believe that there was any such intent section-by-section and paragraph-by-paragraph is delusional. Either Congress enacted Title III only with domestic entities (and not foreign-flag ships) in mind, or it intended Title III to apply across-the-board. It could not possibly be the real congressional intent that foreign-flag cruise ships be considered "place[s] of public accommodation" or "specified public transportation" for purposes of certain provisions but not for others. That Congress had separate foreign-flag intent with respect to each requirement—and would presumably adopt a clear statement provision-by-provision—is utterly implausible. And far from its being the case that this creates "a trap for an unwary Congress," *ante*, at 139, it is the plurality's disposition that, in piecemeal fashion, applies to foreign-flag ships provisions never enacted with foreign-flag vessels in mind.[7] We recently addressed a similar question

[7] The plurality's discussion of *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195 (1970), is misleading. Although *Ariadne* clearly recognized the existence of an internal-order rule in our case law, see *id.*, at 200, *Ariadne* did not hold, similarly to what the plurality holds here, that application of the foreign-flag clear-statement rule prevented some provisions of the National Labor Relations Act (NLRA) from being applied to foreign-flag ships but allowed others to be applied. Rather, it held that the clear-statement rule *did not apply at all* to activities that were not "within the 'maritime operations of foreign-flag ships.'" *Ibid.* The case

in *Clark* v. *Martinez*, 543 U. S. 371 (2005), where we explained that a statutory provision must be interpreted consistently from case to case. "It is not at all unusual to give a statut[e] . . . a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Id.*, at 380. That principle should apply here. Since some applications of Title III plainly affect the internal order of foreign-flag ships, the absence of a clear statement renders the statute inapplicable—even though some applications of the statute, if severed from the rest, would not require clear statement.

This does not mean that a clear statement is required whenever a court applies Title III to any entity—only that a clear statement is required to apply any part of Title III *to foreign-flag ships*. *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533 (2002), and *Jinks* v. *Richland County*, 538 U. S. 456 (2003), do not dictate otherwise. *Raygor* held that 28 U. S. C. § 1367(d) does not include, in its tolling of the limitations period, claims against States, because it contains no clear statement that States are covered. *Jinks* held that § 1367(d)'s tolling provision does apply to claims against political subdivisions of States, because no clear-statement requirement applies to those entities. In other words, a clear statement is required to apply § 1367(d) to States, just as a clear statement is required to apply Title III to foreign-flag ships. A clear statement is *not* required to apply § 1367(d) to political subdivisions of States, just as a clear statement is *not* required to apply Title III to domestic ships or other domestic entities. The question in each of these cases is whether *the statute* at issue covers certain entities, not whether some *provisions* of a statute cover a given entity.

---

is relevant only to questions the Court does not decide here—namely, application of Title III to onshore operations of the foreign-flag ships. It is *not* relevant to the question whether *all* maritime activities are exempt from Title III for lack of a clear statement.

The fine tuning of legislation that the plurality requires would be better left to Congress. To attempt it through the process of case-by-case adjudication is a recipe for endless litigation and confusion. The plurality's resolution of today's case proves the point. It requires this Title III claimant (and every other one who brings a claim against a foreign shipowner) to show that each particular remedy he seeks does not implicate the internal order of the ship. That showing, where structural modification is involved, would not only require the district court to determine what is "readily achievable," *ante*, at 135–136 (majority opinion), and what would "pose 'a significant risk to the health or safety of others,'" *ante*, at 136 (majority opinion) (quoting § 12182(b)(3)), but would also require it to determine the obligations imposed by foreign law and international treaties.[8] All this to establish the preliminary point that Title III applies and the claim can proceed to adjudication. If Congress desires to impose this time-consuming and intricate process, it is certainly able to do so—though I think it would likely prefer some more manageable solution.[9] But for the plural-

---

[8] The plurality attempts to simplify this inquiry by explaining that, if it is "a difficult question whether a particular Title III barrier-removal requirement is readily achievable, but the requirement does entail a permanent and significant structural modification, interfering with a foreign ship's internal affairs[,] a court sensibly could invoke the clear statement rule without determining whether Title III actually imposes the requirement." *Ante*, at 137. It is impossible to reconcile this with the plurality's rationale, which excludes the clear-statement rule when there is no actual conflict with foreign law. On the plurality's own analysis, significant structural modifications are *least likely* to pose an actual conflict with foreign law, since they are *most likely* to be regarded as (under the plurality's new Title III jurisprudence) not "readily achievable" and hence not required. I am at a loss to understand what the plurality has in mind.

[9] After this Court concluded, in *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 260 (1991) *(ARAMCO)*, that Title VII of the Civil Rights Act of 1964 does not protect American citizens working for American employers in foreign countries, Congress amended Title VII. Unlike what would have been this Court's only available resolution of the issue had it

ity to impose it as a novel consequence of the venerable clear-statement rule seems to me unreasonable. I would therefore decline to apply all of Title III to foreign-flag ships without a clear statement from Congress.

II

As the Court appears to concede, neither the "public accommodation" provision nor the "specified public transportation" provision of Title III clearly covers foreign-flag cruise ships. The former prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U. S. C. § 12182(a). Though Congress gave a seemingly exhaustive list of entities constituting "public accommodation[s]"—including inns, hotels, restaurants, theaters, banks, zoos, and laundromats—it failed to mention ships, much less foreign-flag ships. See § 12181(7). Particularly where Congress has provided such detailed specification, this is not a clear statement that foreign-flag ships are covered. Petitioners also claim that, because cruise ships are essentially floating hotels that contain restaurants and other facilities explicitly named in § 12181(7), they should be covered. While this may support the argument that *cruise ships* are "public accommodations," it does not support the position that Congress intended to reach *foreign-flag* cruise ships.

The "specified public transportation" provision prohibits discrimination on the basis of disability "in the full and equal

---

come to the opposite conclusion in *ARAMCO*—that Title VII applies to all American employers operating abroad—Congress was able to craft a more nuanced solution by exempting employers if compliance with Title VII would run afoul of the law in the country where the workplace was located. See 42 U. S. C. § 2000e–1(b); cf. § 12112(c)(1) (same disposition for Title I of the ADA).

enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." § 12184(a). The definition of "specified public transportation" includes "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." § 12181(10). "[A]ny other conveyance" clearly covers ships. But even if the statute specifically *mentioned* ships, that would not be a clear statement that *foreign-flag* ships are included—any more than the reference to "employer" in the NLRA constituted a clear statement that foreign-flag ship employers were covered, see *McCulloch*, 372 U. S., at 19–21.

Title III of the ADA stands in contrast to other statutes in which Congress *has* made clear its intent to extend its laws to foreign ships. For example, the Maritime Drug Law Enforcement Act, 94 Stat. 1159, 46 U. S. C. App. § 1901 *et seq.*, which permits the inspection and apprehension of vessels suspected of possessing controlled substances, applies to "vessel[s] subject to the jurisdiction of the United States," § 1903(a), which includes vessels "located within the customs waters of the United States," § 1903(c)(1)(D), and "vessel[s] registered in a foreign nation where the flag nation has consented or waived objection" to United States jurisdiction, § 1903(c)(1)(C). Section 5 of the Johnson Act, 64 Stat. 1135, as amended, 106 Stat. 61, 15 U. S. C. § 1175(a), restricts the use of gambling devices "on a vessel . . . documented under the laws of a foreign country." See also 14 U. S. C. § 89(a) (Coast Guard may engage in searches on "waters over which the United States has jurisdiction" of "any vessel subject to the jurisdiction, or to the operation of any law, of the United States"); 18 U. S. C. § 2274 (making it unlawful for "the owner, master or person in charge or command of any private vessel, foreign or domestic . . . within the territorial waters of the United States" willfully to cause or

permit the destruction or injury of their vessel in certain circumstances).

That the Department of Justice and the Department of Transportation—the executive agencies charged with enforcing the ADA—appear to have concluded that Congress intended Title III to apply to foreign-flag cruise ships does not change my view. We "accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *ARAMCO*, 499 U. S. 244, 260 (1991) (SCALIA, J., concurring in part and concurring in judgment) (declining to adopt the Equal Employment Opportunity Commission's determination that Title VII applied to employers abroad); see also *id.*, at 257–258 (opinion of the Court) (same). In light of our longstanding clear-statement rule, it is not reasonable to apply Title III here.

I would therefore affirm the Fifth Circuit's judgment that Title III of the ADA does not apply to foreign-flag cruise ships in United States territorial waters.

Syllabus

JOHNSON *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 04–6964. Argued April 18, 2005—Decided June 13, 2005

Petitioner Johnson, a black man, was convicted in a California state court of assaulting and murdering a white child. During jury selection, a number of prospective jurors were removed for cause until 43 eligible jurors remained, three of whom were black. The prosecutor used 3 of his 12 peremptory challenges to remove the prospective black jurors, resulting in an all-white jury. Defense counsel objected to those strikes on the ground that they were unconstitutionally based on race. The trial judge did not ask the prosecutor to explain his strikes, but instead simply found that petitioner had failed to establish a prima facie case of purposeful discrimination under the governing state precedent, *People* v. *Wheeler*, which required a showing of a strong likelihood that the exercise of peremptory challenges was based on group bias. The judge explained that, although the case was close, her review of the record convinced her that the prosecutor's strikes could be justified by race-neutral reasons. The California Court of Appeal set aside the conviction, but the State Supreme Court reinstated it, stressing that *Batson* v. *Kentucky*, 476 U. S. 79, permits state courts to establish the standards used to evaluate the sufficiency of prima facie cases of purposeful discrimination in jury selection. Reviewing *Batson*, *Wheeler*, and their progeny, the court concluded that *Wheeler*'s "strong likelihood" standard is entirely consistent with *Batson*. Under *Batson*, the court held, a state court may require the objector to present not merely enough evidence to permit an inference that discrimination has occurred, but sufficiently strong evidence to establish that the challenges, if not explained, were more likely than not based on race. Applying that standard, the court acknowledged that the exclusion of all three black prospective jurors looked suspicious, but deferred to the trial judge's ruling.

Held: California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case of purposeful discrimination in jury selection. This narrow but important issue concerns the scope of the first of three steps *Batson* enumerated: (1) Once the defendant has made out a prima facie case and (2) the State has satisfied its burden to offer permissible race-neutral justifications for the strikes, *e. g.*, 476 U. S., at 94, then (3) the trial court must decide whether the defendant has proved purposeful racial discrimination,

Syllabus

Purkett v. *Elem*, 514 U. S. 765 *(per curiam)*. *Batson* does not permit California to require at step one that the objector show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. The *Batson* Court held that a prima facie case can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." 476 U. S., at 94. The Court explained that to establish a prima facie case, the defendant must show that his membership in a cognizable racial group, the prosecutor's exercise of peremptory challenges to remove members of that group, the indisputable fact that such challenges permit those inclined to discriminate to do so, and any other relevant circumstances raise an inference that the prosecutor excluded venire members on account of race. *Id.*, at 96. The Court assumed that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the peremptory challenge was improperly motivated. The Court did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies *Batson*'s first step requirements by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. The facts of this case illustrate that California's standard is at odds with the prima facie inquiry mandated by *Batson*. The permissible inferences of discrimination, which caused the trial judge to comment that the case was close and the California Supreme Court to acknowledge that it was suspicious that all three black prospective jurors were removed, were sufficient to establish a prima facie case. Pp. 168–173.

Reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 173. THOMAS, J., filed a dissenting opinion, *post*, p. 173.

Stephen B. Bedrick, by appointment of the Court, 543 U. S. 1143, argued the cause for petitioner. With him on the briefs was *Eric Schnapper*.

Seth K. Schalit, Supervising Deputy Attorney General of California, argued the cause for respondent. With him on

the brief were *Bill Lockyer*, Attorney General, *Robert R. Anderson*, Chief Assistant Attorney General, *Gerald A. Engler*, Senior Assistant Attorney General, and *Laurence K. Sullivan*, Supervising Deputy Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

The Supreme Court of California and the United States Court of Appeals for the Ninth Circuit have provided conflicting answers to the following question: "Whether to establish a *prima facie* case under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the objector must show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias?" Pet. for Cert. i. Because both of those courts regularly review the validity of convictions obtained in California criminal trials, respondent, the State of California, agreed to petitioner's request that we grant certiorari and resolve the conflict. We agree with the Ninth Circuit that the question presented must be answered in the negative, and accordingly reverse the judgment of the California Supreme Court.

I

Petitioner Jay Shawn Johnson, a black male, was convicted in a California trial court of second-degree murder and assault on a white 19-month-old child, resulting in death. During jury selection, a number of prospective jurors were removed for cause until 43 eligible jurors remained, 3 of whom were black. The prosecutor used 3 of his 12 peremptory challenges to remove the black prospective jurors. The resulting jury, including alternates, was all white.

**Theodore M. Shaw, Norman J. Chachkin, Miriam Gohara, Christina A. Swarns, Steven R. Shapiro, Alan L. Schlosser, Pamela Harris, Barbara R. Arnwine, Michael L. Foreman, Audrey Wiggins, Sarah Crawford,* and *Barry Sullivan* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging reversal.

Kent S. Scheidegger and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

After the prosecutor exercised the second of his three peremptory challenges against the prospective black jurors, defense counsel objected on the ground that the challenge was unconstitutionally based on race under both the California and United States Constitutions. *People* v. *Johnson*, 30 Cal. 4th 1302, 1307, 71 P. 3d 270, 272–273 (2003).[1] Defense counsel alleged that the prosecutor "had no apparent reason to challenge this prospective juror 'other than [her] racial identity.'" *Ibid.* (alteration in original). The trial judge did not ask the prosecutor to explain the rationale for his strikes. Instead, the judge simply found that petitioner had failed to establish a prima facie case under the governing state precedent, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), reasoning "'that there's not been shown a *strong likelihood* that the exercise of the peremptory challenges were based upon a group rather than an individual basis,'" 30 Cal. 4th, at 1307, 71 P. 3d, at 272 (emphasis added). The judge did, however, warn the prosecutor that "'we are very close.'" *People* v. *Johnson*, 105 Cal. Rptr. 2d 727, 729 (Ct. App. 2001).

Defense counsel made an additional motion the next day when the prosecutor struck the final remaining prospective black juror. 30 Cal. 4th, at 1307, 71 P. 3d, at 272. Counsel argued that the prosecutor's decision to challenge all of the prospective black jurors constituted a "systematic attempt to exclude African-Americans from the jury panel." 105 Cal. Rptr. 2d, at 729. The trial judge still did not seek an explanation from the prosecutor. Instead, she explained that her own examination of the record had convinced her that the prosecutor's strikes could be justified by race-neutral reasons. Specifically, the judge opined that the black venire members had offered equivocal or confused answers in their written questionnaires. 30 Cal. 4th, at 1307–1308, 71 P. 3d, at 272–273. Despite the fact that "'the Court would not grant the challenges for cause, there were an-

[1] Petitioner's state objection was made under *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978).

swers . . . at least on the questionnaires themselves [such] that the Court felt that there was sufficient basis'" for the strikes. *Id.*, at 1308, 71 P. 3d, at 273 (brackets added). Therefore, even considering that all of the prospective black jurors had been stricken from the pool, the judge determined that petitioner had failed to establish a prima facie case.

The California Court of Appeal set aside the conviction. *People* v. *Johnson*, 105 Cal. Rptr. 2d 727 (2001). Over the dissent of one judge, the majority ruled that the trial judge had erred by requiring petitioner to establish a "strong likelihood" that the peremptory strikes had been impermissibly based on race. Instead, the trial judge should have only required petitioner to proffer enough evidence to support an "inference" of discrimination.[2] The Court of Appeal's holding relied on decisions of this Court, prior California case law, and the decision of the United States Court of Appeals for the Ninth Circuit in *Wade* v. *Terhune*, 202 F. 3d 1190 (2000). Applying the proper "reasonable inference" standard, the majority concluded that petitioner had produced sufficient evidence to support a prima facie case.

Respondent appealed, and the California Supreme Court reinstated petitioner's conviction over the dissent of two justices. The court stressed that *Batson* v. *Kentucky*, 476 U. S. 79 (1986), left to state courts the task of establishing the standards used to evaluate the sufficiency of defendants' prima facie cases. 30 Cal. 4th, at 1314, 71 P. 3d, at 277. The court then reviewed *Batson*, *Wheeler*, and those decisions' progeny, and concluded that "*Wheeler*'s terms 'strong likelihood' and 'reasonable inference' state the same standard"—one that is entirely consistent with *Batson*. 30 Cal. 4th, at 1313, 71 P. 3d, at 277. A prima facie case under *Batson* es-

---

[2] In reaching this holding, the Court of Appeal rejected the notion that a showing of a "'strong likelihood'" is equivalent to a "'reasonable inference.'" To conclude so would "be as novel a proposition as the idea that 'clear and convincing evidence' has always meant a 'preponderance of the evidence.'" 105 Cal. Rptr. 2d, at 733.

tablishes a "'legally mandatory, rebuttable presumption,'" it does not merely constitute "enough evidence to *permit the inference*" that discrimination has occurred. 30 Cal. 4th, at 1315, 71 P. 3d, at 278. *Batson*, the court held, "permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent *more likely than not* if the challenges are not explained." 30 Cal. 4th, at 1316, 71 P. 3d, at 278. The court opined that while this burden is "not onerous," it remains "substantial." *Ibid.*, 71 P. 3d, at 279.

Applying that standard, the court acknowledged that the case involved the "highly relevant" circumstance that a black defendant was "charged with killing 'his White girlfriend's child,'" and that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury." *Id.*, at 1326, 71 P. 3d, at 286. Yet petitioner's *Batson* showing, the court held, consisted "primarily of the statistical disparity of peremptory challenges between African-Americans and others." 30 Cal. 4th, at 1327, 71 P. 3d, at 287. Although those statistics were indeed "troubling and, as the trial court stated, the question was close," *id.*, at 1328, 71 P. 3d, at 287, the court decided to defer to the trial judge's "carefully considered ruling." *Ibid.*[3] We granted certiorari, but dismissed the case for want of jurisdiction because the judgment was not yet final. *Johnson* v. *California*, 541 U. S. 428 (2004) *(per curiam)*. After the California Court

---

[3] In dissent, Justice Kennard argued that "[r]equiring a defendant to persuade the trial court of the prosecutor's discriminatory purpose at the first *Wheeler-Batson* stage short-circuits the process, and provides inadequate protection for the defendant's right to a fair trial . . . ." 30 Cal. 4th, at 1333, 71 P. 3d, at 291. The proper standard for measuring a prima facie case under *Batson* is whether the defendant has identified actions by the prosecutor that, "*if unexplained*, permit a reasonable inference of an improper purpose or motive." 30 Cal. 4th, at 1339, 71 P. 3d, at 294. Trial judges, Justice Kennard argued, should not speculate when it is not "apparent that the [neutral] explanation was the true reason for the challenge." *Id.*, at 1340, 71 P. 3d, at 295.

of Appeal decided the remaining issues, we again granted certiorari. 543 U. S. 1042 (2005).

II

The issue in this case is narrow but important. It concerns the scope of the first of three steps this Court enumerated in *Batson*, which together guide trial courts' constitutional review of peremptory strikes. Those three *Batson* steps should by now be familiar. First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." 476 U. S., at 93–94 (citing *Washington* v. *Davis*, 426 U. S. 229, 239–242 (1976)).[4] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. 476 U. S., at 94; see also *Alexander* v. *Louisiana*, 405 U. S. 625, 632 (1972). Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." *Purkett* v. *Elem*, 514 U. S. 765, 767 (1995) *(per curiam)*.

The question before us is whether *Batson* permits California to require at step one that "the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." 30 Cal. 4th, at 1318, 71 P. 3d, at 280. Although we recognize that States do have flexibility in formulating appropriate procedures to comply with *Batson*, we conclude that California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case.

---

[4] An "inference" is generally understood to be a "conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 781 (7th ed. 1999).

We begin with *Batson* itself, which on its own terms provides no support for California's rule. There, we held that a prima facie case of discrimination can be made out by offering a wide variety of evidence,[5] so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." 476 U. S., at 94. We explained:

> "[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.*, at 96 (quoting *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953); citations omitted).

Indeed, *Batson* held that because the petitioner had timely objected to the prosecutor's decision to strike "all black persons on the venire," the trial court was in error when it

---

[5] In *Batson*, we spoke of the methods by which prima facie cases could be proved in permissive terms. A defendant may satisfy his prima facie burden, we said, "by relying solely on the facts concerning [the selection of the venire] *in his case*." 476 U. S., at 95 (emphasis in original). We declined to require proof of a pattern or practice because "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" *Ibid.* (quoting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266, n. 14 (1977)).

"flatly rejected the objection without requiring the prosecutor to give an explanation for his action." 476 U. S., at 100. We did not hold that the petitioner had proved discrimination. Rather, we remanded the case for further proceedings because the trial court failed to demand an explanation from the prosecutor—*i. e.*, to proceed to *Batson*'s second step—despite the fact that the petitioner's evidence supported *an inference* of discrimination. *Ibid.*

Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Respondent, however, focuses on *Batson*'s ultimate sentence: "If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." *Ibid.* For this to be true, respondent contends, a *Batson* claim must prove the ultimate facts by a preponderance of the evidence in the prima facie case; otherwise, the argument goes, a prosecutor's failure to respond to a prima facie case would inexplicably entitle a defendant to judgment as a matter of law on the basis of nothing more than an inference that discrimination may have occurred. Brief for Respondent 13–18.

Respondent's argument is misguided. *Batson*, of course, explicitly stated that the defendant ultimately carries the

"burden of persuasion" to "'prove the existence of purposeful discrimination.'" 476 U. S., at 93 (quoting *Whitus* v. *Georgia*, 385 U. S. 545, 550 (1967)). This burden of persuasion "rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U. S., at 768. Thus, even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. *Ibid.*[6] The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett*, 514 U. S., at 768.[7]

Batson's purposes further support our conclusion. The constitutional interests *Batson* sought to vindicate are not

---

[6] In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case. Cf. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 111 (1927).

[7] This explanation comports with our interpretation of the burden-shifting framework in cases arising under Title VII of the Civil Rights Act of 1964. See, *e. g.*, *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978) (noting that the *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), framework "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); see also *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 509–510, and n. 3 (1993) (holding that determinations at steps one and two of the *McDonnell Douglas* framework "can involve no credibility assessment" because "the burden-of-production determination necessarily *precedes* the credibility-assessment stage," and that the burden-shifting framework triggered by a defendant's prima face case is essentially just "a means of 'arranging the presentation of evidence'" (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988))).

limited to the rights possessed by the defendant on trial, see 476 U. S., at 87, nor to those citizens who desire to participate "in the administration of the law, as jurors," *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880). Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U. S., at 87; see also *Smith* v. *Texas*, 311 U. S. 128, 130 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government" (footnote omitted)).

The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U. S., at 97–98, and n. 20. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See *Paulino* v. *Castro*, 371 F. 3d 1083, 1090 (CA9 2004) ("[I]t does not matter that the prosecutor might have had good reasons . . . [;] [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway* v. *Horn*, 355 F. 3d 707, 725 (CA3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike). The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages "prompt rulings on objections to peremptory challenges without substantial disruption of the

jury selection process." *Hernandez* v. *New York*, 500 U. S. 352, 358–359 (1991) (opinion of KENNEDY, J.).

The disagreements among the state-court judges who reviewed the record in this case illustrate the imprecision of relying on judicial speculation to resolve plausible claims of discrimination. In this case the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close,'" and on review, the California Supreme Court acknowledged that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury." 30 Cal. 4th, at 1307, 1326, 71 P. 3d, at 273, 286. Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*.

The facts of this case well illustrate that California's "more likely than not" standard is at odds with the prima facie inquiry mandated by *Batson*. The judgment of the California Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered

JUSTICE BREYER, concurring.

I join the Court's opinion while maintaining here the views I set forth in my concurring opinion in *Miller-El* v. *Dretke*, *post*, p. 266.

JUSTICE THOMAS, dissenting.

The Court says that States "have flexibility in formulating appropriate procedures to comply with *Batson* [v. *Kentucky*, 476 U. S. 79 (1986)]," *ante*, at 168, but it then tells California how to comply with "the prima facie inquiry mandated by *Batson*," *ante* this page. In *Batson* itself, this Court disclaimed any intent to instruct state courts on how to implement its holding. 476 U. S., at 99 ("We decline, however, to formulate particular procedures to be followed upon a de-

fendant's timely objection to a prosecutor's challenges"); *id.*, at 99–100, n. 24. According to *Batson*, the Equal Protection Clause requires that prosecutors select juries based on factors other than race—not that litigants bear particular burdens of proof or persuasion. Because *Batson*'s burden-shifting approach is "a prophylactic framework" that polices racially discriminatory jury selection rather than "an independent constitutional command," *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987), States have "wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy," *Smith* v. *Robbins*, 528 U. S. 259, 273 (2000); *Dickerson* v. *United States*, 530 U. S. 428, 438–439 (2000). California's procedure falls comfortably within its broad discretion to craft its own rules of criminal procedure, and I therefore respectfully dissent.

Syllabus

BRADSHAW, WARDEN *v.* STUMPF

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–637. Argued April 19, 2005—Decided June 13, 2005

Respondent Stumpf and his accomplice Wesley committed an armed robbery that left Mr. Stout wounded and Mrs. Stout dead. Stumpf admitted shooting Mr. Stout but has always denied killing Mrs. Stout. In Ohio state court proceedings, Stumpf pleaded guilty to, among other things, aggravated murder and one of three capital murder specifications charged in his indictment. This left Stumpf eligible for the death penalty. In a contested penalty hearing before a three-judge panel, Stumpf's principal mitigation arguments were that he had participated in the robbery at Wesley's urging, that Wesley had killed Mrs. Stout, and that Stumpf's minor role in the murder counseled against the death sentence. The State, however, claimed that Stumpf had shot Mrs. Stout, and that he therefore was the principal offender in her murder. In the alternative, the State noted that even an accomplice can be sentenced to death under Ohio law if he acted with the specific intent to cause death, and the State argued that such intent could be inferred from the circumstances of the robbery regardless of who actually shot Mrs. Stout. The panel concluded that Stumpf was the principal offender and sentenced him to death. At Wesley's subsequent jury trial, however, the State presented evidence that Wesley had admitted to shooting Mrs. Stout. But Wesley argued that the prosecutor had taken a contrary position in Stumpf's trial, and Wesley was sentenced to life in prison with the possibility of parole. After Wesley's trial, Stumpf moved to withdraw his own plea or vacate his death sentence, arguing that the evidence endorsed by the State in Wesley's trial cast doubt on Stumpf's conviction and sentence. This time, however, the prosecutor emphasized other evidence confirming Stumpf as the shooter and again raised, in the alternative, the aider-and-abettor theory. The court denied Stumpf's motion, and Ohio's appellate courts affirmed. Subsequently, the Federal District Court denied Stumpf habeas relief, but the Sixth Circuit reversed on two grounds. First, the Sixth Circuit found that Stumpf had not understood that specific intent to cause death was a necessary element of the aggravated murder charge, and that his guilty plea therefore had not been knowing, voluntary, and intelligent. Second, the court found that the conviction and sentence could not stand

because the State had secured convictions of both Stumpf and Wesley for the same crime, using inconsistent theories.

Held:

1. The Sixth Circuit erred in concluding that Stumpf was uninformed of the aggravated murder charge's specific intent element. While a guilty plea is invalid if the defendant has not been informed of the crime's elements, Stumpf's attorneys represented at his plea hearing that they had explained the elements to their client, and Stumpf confirmed that the representation was true. This Court has never held that the judge must himself explain a crime's elements to the defendant. Rather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel. Stumpf argues that his plea was so inconsistent with his denial of having shot Mrs. Stout that he could only have pleaded guilty out of ignorance of the aggravated murder charge's specific intent element. But that argument fails because Stumpf's conviction did not require a showing that Stumpf had shot Mrs. Stout. Ohio law also considers aiders and abettors who act with specific intent to cause death liable for aggravated murder. Stumpf and Wesley entered the Stout home with guns, intending to commit armed robbery, and Stumpf admitted shooting Mr. Stout. Taken together, these facts could show that the two men had agreed to kill both Stouts, which in turn could make both men guilty of aggravated murder regardless of who shot Mrs. Stout. Stumpf's claim that he and his attorneys were confused about the relevance and timing of defenses that they planned to make is not supported by the record. Finally, the plea's validity may not be collaterally attacked on the ground that Stumpf made what he now claims was a bad deal. Pp. 182–186.

2. The Sixth Circuit was also wrong to hold that prosecutorial inconsistencies between the Stumpf and Wesley cases required voiding Stumpf's guilty plea. The precise identity of the triggerman was immaterial to Stumpf's aggravated murder conviction, and Stumpf has never explained how the prosecution's postplea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea. Pp. 186–187.

3. The prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is arguable that the sentencing panel's conclusion about his role was material to its sentencing determination. The opinion below leaves some ambiguity as to the overlap between how the lower court resolved Stumpf's due process challenge to his conviction and how it resolved his challenge to his sentence. It is not clear whether the Court of Appeals would have found

Stumpf entitled to resentencing had it not also considered the conviction invalid. Likewise, the parties' briefing here, and the question on which this Court granted certiorari, largely focused on the conviction. In these circumstances, it would be premature for this Court to resolve the merits of Stumpf's sentencing claim before giving the Sixth Circuit the opportunity to consider in the first instance the question of how the prosecutor's conduct in the Stumpf and Wesley cases related to Stumpf's death sentence in particular. Pp. 187–188.

367 F. 3d 594, reversed in part, vacated in part, and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. SOUTER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 188. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 190.

Douglas R. Cole, State Solicitor of Ohio, argued the cause for petitioner. With him on the briefs were *Jim Petro*, Attorney General, *Diane Richards Brey*, Deputy Solicitor, and *Charles L. Wille*, *Henry G. Appel*, *Stephen E. Maher*, and *Franklin E. Crawford*, Assistant Solicitors.

Alan M. Freedman, by appointment of the Court, 543 U. S. 1143, argued the cause for respondent. With him on the brief were *Carol R. Heise*, *Laurence E. Komp*, *Gary Prichard*, and *Michael J. Benza*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns respondent John David Stumpf's conviction and death sentence for the murder of Mary Jane Stout. In adjudicating Stumpf's petition for a writ of habeas corpus, the United States Court of Appeals for the Sixth Circuit granted him relief on two grounds: that his guilty plea was not knowing, voluntary, and intelligent, and that his conviction and sentence could not stand because the State, in a later trial of Stumpf's accomplice, pursued a theory of the case inconsistent with the theory it had advanced

**Ellen S. Podgor* and *Joshua L. Dratel* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

in Stumpf's case. We granted certiorari to review both holdings. 543 U. S. 1042 (2005).

I

On May 14, 1984, Stumpf and two other men, Clyde Daniel Wesley and Norman Leroy Edmonds, were traveling in Edmonds' car along Interstate 70 through Guernsey County, Ohio. Needing money for gas, the men stopped the car along the highway. While Edmonds waited in the car, Stumpf and Wesley walked to the home of Norman and Mary Jane Stout, about 100 yards away. Stumpf and Wesley, each concealing a gun, talked their way into the home by telling the Stouts they needed to use the phone. Their real object, however, was robbery: Once inside, Stumpf held the Stouts at gunpoint, while Wesley ransacked the house. When Mr. Stout moved toward Stumpf, Stumpf shot him twice in the head, causing Mr. Stout to black out. After he regained consciousness, Mr. Stout heard two male voices coming from another room, and then four gunshots—the shots that killed his wife. Edmonds was arrested shortly afterward, and his statements led the police to issue arrest warrants for Stumpf and Wesley. Stumpf, who surrendered to the police, at first denied any knowledge of the crimes. After he was told that Mr. Stout had survived, however, Stumpf admitted to participating in the robbery and to shooting Mr. Stumpf. But he claimed not to have shot Mrs. Stout, and he has maintained that position ever since.

The proceedings against Stumpf occurred while Wesley, who had been arrested in Texas, was still resisting extradition to Ohio. Stumpf was indicted for aggravated murder, attempted aggravated murder, aggravated robbery, and two counts of grand theft. With respect to the aggravated murder charge, the indictment listed four statutory "specifications"—three of them aggravating circumstances making Stumpf eligible for the death penalty. See App. 117–118;

Ohio Rev. Code Ann. § 2929.03 (Anderson 1982).* The case was assigned to a three-judge panel in the Court of Common Pleas.

Rather than proceed to trial, however, Stumpf and the State worked out a plea agreement: Stumpf would plead guilty to aggravated murder and attempted aggravated murder, and the State would drop most of the other charges; with respect to the aggravated murder charge, Stumpf would plead guilty to one of the three capital specifications, with the State dropping the other two. The plea was accepted after a colloquy with the presiding judge, and after a hearing in which the panel satisfied itself as to the factual basis for the plea.

Because the capital specification to which Stumpf pleaded guilty left him eligible for the death penalty, a contested penalty hearing was held before the same three-judge panel. Stumpf's mitigation case was based in part on his difficult childhood, limited education, dependable work history, youth, and lack of prior serious offenses. Stumpf's principal argument, however, was that he had participated in the plot only at the urging and under the influence of Wesley, that it was Wesley who had fired the fatal shots at Mrs. Stout, and that Stumpf's assertedly minor role in the murder counseled against the death sentence. See § 2929.04(B)(6) (directing the sentencer to consider as a potential mitigating circumstance, "[i]f the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense"). The State, on the other hand, argued that Stumpf had indeed shot Mrs. Stout. Still, while the prosecutor claimed Stumpf's allegedly primary role in the shooting as a special reason to reject Stumpf's mitigation argument, the prosecutor also noted that Ohio law did not restrict the death penalty to those who commit murder by their own hands—an accomplice to murder could also receive

*Unless otherwise noted, all citations to Ohio statutes refer to the versions of those statutes in effect in 1984, at the time of the crime and trial.

the death penalty, so long as he acted with the specific intent to cause death. As a result, the State argued, Stumpf deserved death even if he had not personally shot Mrs. Stout, because the circumstances of the robbery provided a basis from which to infer Stumpf's intent to cause death. The three-judge panel, agreeing with the State's first contention, specifically found that Stumpf "was the principal offender" in the aggravated murder of Mrs. Stout. App. 196. Determining that the aggravating factors in Stumpf's case outweighed any mitigating factors, the panel sentenced Stumpf to death.

Afterward, Wesley was successfully extradited to Ohio to stand trial. His case was tried to a jury, before the same judge who had presided over the panel overseeing Stumpf's proceedings, and with the same prosecutor. This time, however, the prosecutor had new evidence: James Eastman, Wesley's cellmate after his extradition, testified that *Wesley* had admitted to firing the shots that killed Mrs. Stout. The prosecutor introduced Eastman's testimony in Wesley's trial, and in his closing argument he argued for Eastman's credibility and lack of motive to lie. The prosecutor claimed that Eastman's testimony, combined with certain circumstantial evidence and with the implausibility of Wesley's own account of events, proved that Wesley was the principal offender in Mrs. Stout's murder—and that Wesley therefore deserved to be put to death. One way Wesley countered this argument was by noting that the prosecutor had taken a contrary position in Stumpf's trial, and that Stumpf had already been sentenced to death for the crime. Wesley also took the stand in his own defense, and testified that Stumpf had shot Mrs. Stout. In the end, the jury sentenced Wesley to life imprisonment with the possibility of parole after 20 years.

After the Wesley trial, Stumpf, whose direct appeal was still pending in the Ohio Court of Appeals, returned to the Court of Common Pleas with a motion to withdraw his guilty plea or vacate his death sentence. Stumpf argued that

Eastman's testimony, and the prosecution's endorsement of that testimony in Wesley's trial, cast doubt upon Stumpf's conviction and sentence. The State (represented again by the same prosecutor who had tried both Wesley's case and Stumpf's original case) disagreed. According to the prosecutor, the court's first task was to decide whether the Eastman testimony was sufficient to alter the court's prior determination that Stumpf had been the shooter. *Id.*, at 210. Contrary to the argument he had presented in the Wesley trial, however, the prosecutor now noted that Eastman's testimony was belied by certain other evidence (ballistics evidence and Wesley's testimony in his own defense) confirming Stumpf to have been the primary shooter. In the alternative, the State noted as it had before that an aider-and-abettor theory might allow the death sentence to be imposed against Stumpf even if he had not shot Mrs. Stout.

Although one judge speculated during oral argument that the court's earlier conclusion about Stumpf's principal role in the killing "may very well have had an effect upon" the prior sentencing determination, *ibid.*, the Court of Common Pleas denied Stumpf's motion in a brief summary order without explanation. That order was appealed together with the original judgment in Stumpf's case, and the Ohio Court of Appeals affirmed, as did the Ohio Supreme Court. *State* v. *Stumpf*, 32 Ohio St. 3d 95, 512 N. E. 2d 598 (1987), cert. denied, 484 U. S. 1079 (1988).

After a subsequent request for state postconviction relief was denied by the state courts, Stumpf filed this federal habeas petition in the United States District Court for the Southern District of Ohio in November 1995. The District Court denied Stumpf relief, but granted permission to appeal on four claims, including the two at issue here. The United States Court of Appeals for the Sixth Circuit reversed, concluding that habeas relief was warranted on "either or both" of "two alternative grounds." *Stumpf* v. *Mitchell*, 367 F. 3d 594, 596 (2004). First, the court determined that Stumpf's

guilty plea was invalid because it had not been entered knowingly and intelligently. More precisely, the court concluded that Stumpf had pleaded guilty to aggravated murder without understanding that specific intent to cause death was a necessary element of the charge under Ohio law. See Ohio Rev. Code Ann. §§ 2903.01(B) and (D). Noting that Stumpf had all along denied shooting Mrs. Stout, and considering those denials inconsistent with an informed choice to plead guilty to aggravated murder, the Court of Appeals concluded that Stumpf must have entered his plea out of ignorance. Second, the court concluded that "Stumpf's due process rights were violated by the state's deliberate action in securing convictions of both Stumpf and Wesley for the same crime, using inconsistent theories." 367 F. 3d, at 596. This violation, the court held, required setting aside "both Stumpf's plea and his sentence." *Id.*, at 616. One member of the panel dissented.

II

Because Stumpf filed his habeas petition before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we review his claims under the standards of the pre-AEDPA habeas statute. See *Lindh* v. *Murphy*, 521 U. S. 320 (1997). Moreover, because petitioner has not argued that Stumpf's habeas claims were barred as requiring announcement of a new rule, we do not apply the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), to this case. See *Schiro* v. *Farley*, 510 U. S. 222, 229 (1994); *Godinez* v. *Moran*, 509 U. S. 389, 397, n. 8 (1993).

A

The Court of Appeals concluded that Stumpf's plea of guilty to aggravated murder was invalid because he was not aware of the specific intent element of the charge—a determination we find unsupportable.

Stumpf's guilty plea would indeed be invalid if he had not been aware of the nature of the charges against him, includ-

ing the elements of the aggravated murder charge to which he pleaded guilty. A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U. S. 742, 748 (1970). Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid. *Henderson* v. *Morgan*, 426 U. S. 637 (1976).

But the Court of Appeals erred in finding that Stumpf had not been properly informed before pleading guilty. In Stumpf's plea hearing, his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge; Stumpf himself then confirmed that this representation was true. See App. 135, 137–138. While the court taking a defendant's plea is responsible for ensuring "a record adequate for any review that may be later sought," *Boykin* v. *Alabama*, 395 U. S. 238, 244 (1969) (footnote omitted), we have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. Cf. *Henderson*, *supra*, at 647 (granting relief to a defendant unaware of the elements of his crime, but distinguishing that case from others where "the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused"). Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.

Seeking to counter this natural inference, Stumpf argues, in essence, that his choice to plead guilty to the aggravated

murder charge was so inconsistent with his denial of having shot the victim that he could only have pleaded guilty out of ignorance of the charge's specific intent requirement. But Stumpf's asserted inconsistency is illusory. The aggravated murder charge's intent element did not require any showing that Stumpf had himself shot Mrs. Stout. Rather, Ohio law considers aiders and abettors equally in violation of the aggravated murder statute, so long as the aiding and abetting is done with the specific intent to cause death. See *In re Washington*, 81 Ohio St. 3d 337, 691 N. E. 2d 285 (1998); *State* v. *Scott*, 61 Ohio St. 2d 155, 165, 400 N. E. 2d 375, 382 (1980). As a result, Stumpf's steadfast assertion that he had not shot Mrs. Stout would not necessarily have precluded him from admitting his specific intent under the statute.

That is particularly so given the other evidence in this case. Stumpf and Wesley had gone to the Stouts' home together, carrying guns and intending to commit armed robbery. Stumpf, by his own admission, shot *Mr.* Stout in the head at close range. Taken together, these facts could show that Wesley and Stumpf had together agreed to kill both of the Stouts in order to leave no witnesses to the crime. And that, in turn, could make both men guilty of aggravated murder regardless of who actually killed Mrs. Stout. See *ibid.*

Stumpf also points to aspects of the plea hearing transcript which he says show that both he and his attorneys were confused about the relevance and timing of defenses Stumpf and his attorneys had planned to make. First, at one point during the hearing, the presiding judge stated that by pleading guilty Stumpf would waive his trial rights and his right to testify in his own behalf. Stumpf's attorney answered that Stumpf "was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be [a] presentation of evidence." App. 140. The presiding judge responded that "[o]f course in the sentencing portion of this trial you do have those rights to speak in your own

behalf [and] to present evidence and testimony on your own behalf." *Ibid.* A few moments later, there was another exchange along similar lines, after the judge asked Stumpf whether he was "in fact guilty of" the aggravated murder charge and its capital specification:

> "[DEFENSE COUNSEL]: . . . Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.
>
> "JUDGE HENDERSON: At no time am I implying that the defendant will not have the right to present evidence in [the] mitigation hearing . . . . And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one . . . ?
>
> "THE DEFENDANT: Yes, sir." *Id.*, at 142.

Reviewing this exchange, the Court of Appeals concluded that Stumpf "obviously . . . was reiterating his desire to challenge the [S]tate's account of his actions"—that is, to show that he did not intend to kill Mrs. Stout. 367 F. 3d, at 607. But the desire to contest the State's version of events would not necessarily entail the desire to contest the aggravated murder charge or any of its elements. Rather, Stumpf's desire to put on evidence "relative to the underlying facts" and "relative to his conduct" could equally have meant that Stumpf was eager to make his mitigation case—an interpretation bolstered by the attorney's and Stumpf's approving answers after the presiding judge confirmed that the defense could put on evidence "in mitigation" and in "the sentencing" phase. While Stumpf's mitigation case was premised on the argument that Stumpf had not shot Mrs. Stout, that was

fully consistent with his plea of guilty to aggravated murder. See *supra*, at 183–184.

Finally, Stumpf, like the Court of Appeals, relies on the perception that he obtained a bad bargain by his plea—that the State's dropping several nonmurder charges and two of the three capital murder specifications was a bad tradeoff for Stumpf's guilty plea. But a plea's validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal. See *Brady*, 397 U. S., at 757; *Mabry* v. *Johnson*, 467 U. S. 504, 508 (1984). Rather, the shortcomings of the deal Stumpf obtained cast doubt on the validity of his plea only if they show either that he made the unfavorable plea on the constitutionally defective advice of counsel, see *Tollett* v. *Henderson*, 411 U. S. 258, 267 (1973), or that he could not have understood the terms of the bargain he and Ohio agreed to. Though Stumpf did bring an independent claim asserting ineffective assistance of counsel, that claim is not before us in this case. And in evaluating the validity of Stumpf's plea, we are reluctant to accord much weight to his *post hoc* reevaluation of the wisdom of the bargain. Stumpf pleaded guilty knowing that the State had copious evidence against him, including the testimony of Mr. Stout; the plea eliminated two of the three capital specifications the State could rely on in seeking the death penalty; and the plea allowed Stumpf to assert his acceptance of responsibility as an argument in mitigation. Under these circumstances, the plea may well have been a knowing, voluntary, and intelligent reaction to a litigation situation that was difficult, to say the least. The Court of Appeals erred in concluding that Stumpf was uninformed about the nature of the charge he pleaded guilty to, and we reverse that portion of the judgment below.

B

The Court of Appeals was also wrong to hold that prosecutorial inconsistencies between the Stumpf and Wesley cases

required voiding Stumpf's guilty plea. Stumpf's assertions of inconsistency relate entirely to the prosecutor's arguments about which of the two men, Wesley or Stumpf, shot Mrs. Stout. For the reasons given above, see *supra*, at 183–184, the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder. Moreover, Stumpf has never provided an explanation of how the prosecution's postplea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea.

The prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination. The opinion below leaves some ambiguity as to the overlap between how the lower court resolved Stumpf's due process challenge to his conviction, and how it resolved Stumpf's challenge to his sentence. It is not clear whether the Court of Appeals would have concluded that Stumpf was entitled to resentencing had the court not also considered the conviction invalid. Likewise, the parties' briefing to this Court, and the question on which we granted certiorari, largely focused on the lower court's determination about Stumpf's conviction. See, *e. g.*, Pet. for Cert. ii (requesting review of Stumpf's *conviction*, not sentence); Reply Brief for Petitioner 3 (challenge to Court of Appeals' decision is focused on issue of conviction); Brief for Respondent 15, n. 3 ("arguments regarding Stumpf's death sentence are not before this Court"). In these circumstances, it would be premature for this Court to resolve the merits of Stumpf's sentencing claim, and we therefore express no opinion on whether the prosecutor's actions amounted to a due process violation, or whether any such violation would have been prejudicial. The Court of Appeals should have the opportunity to consider, in the first instance, the question of how Eastman's testimony and the

prosecutor's conduct in the Stumpf and Wesley cases relate to Stumpf's death sentence in particular. Accordingly, we vacate the portion of the judgment below relating to Stumpf's prosecutorial inconsistency claim, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring.

I join the opinion of the Court and add this word to explain the issue that I understand we are remanding for further consideration. As the Court notes in its opinion, although respondent John Stumpf challenged both his conviction and his death sentence, his attack on the sentence was not always distinct from the issue raised about the conviction.

I understand Stumpf to claim that it violates the basic due process standard, barring fundamentally unfair procedure, to allow his death sentence to stand in the aftermath of three positions taken by the State: (1) at Stumpf's sentencing hearing; (2) at the trial of Stumpf's codefendant, Clyde Wesley; and (3) in response to Stumpf's motion to withdraw his guilty plea in light of the State's position at the Wesley trial. At the hearing on Stumpf's sentence, the State argued that he was the triggerman, and it urged consideration of that fact as a reason to impose a death sentence. App. 186, 188–189. The trial court found that Stumpf had pulled the trigger and did sentence him to death, though it did not state that finding Stumpf to be the shooter was dispositive in determining the sentence. App. to Pet. for Cert. 219a. After the sentencing proceeding was over, the State tried the codefendant, Wesley, and on the basis of testimony from a new witness argued that Wesley was in fact the triggerman, App. 282, and should be sentenced to death. The new witness was apparently unconvincing to the jury, which in any event was informed that Stumpf had already been sentenced to death for the crime; the jury rejected the specification that named Wesley as the

triggerman, and it recommended a sentence of life, not death. Stumpf then challenged his death sentence (along with his conviction) on the basis of the prosecution's position in the Wesley case. In response, the State did not repudiate the position it had taken in the codefendant's case, or explain that it had made a mistake there. Instead, it merely dismissed the testimony of the witness it had vouched for at Wesley's trial, *id.*, at 125, and maintained that Stumpf's death sentence should stand for some or all of the reasons it originally argued for its imposition. At the end of the day, the State was on record as maintaining that Stumpf and Wesley should both be executed on the ground that each was the triggerman, when it was undisputed that only one of them could have been.

Stumpf's claim as I understand it is not a challenge to the evidentiary basis for arguing for the death penalty in either case; nor is it a claim that the prosecution deliberately deceived or attempted to deceive either trial court, as in *Mooney* v. *Holohan*, 294 U. S. 103 (1935) *(per curiam);* nor does it implicate the rule that inconsistent jury verdicts may be enforced, *United States* v. *Powell*, 469 U. S. 57 (1984); *Dunn* v. *United States*, 284 U. S. 390 (1932). As I see it, Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant. Stumpf's position was anticipated by JUSTICE STEVENS's observation 10 years ago that "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens," and that "[t]he heightened need for reliability in capital cases only underscores the gravity of those questions . . . ." *Jacobs* v. *Scott*, 513 U. S. 1067, 1070 (1995) (citations and internal quotation marks omitted). JUSTICE STEVENS's statement in turn echoed the more general one expressed by Justice Sutherland in *Berger* v. *United States*,

295 U. S. 78, 88 (1935), that the State's interest in winning some point in a given case is transcended by its interest "that justice shall be done." Ultimately, Stumpf's argument appears to be that sustaining a death sentence in circumstances like those here results in a sentencing system that invites the death penalty "to be . . . wantonly and . . . freakishly imposed." *Lewis* v. *Jeffers*, 497 U. S. 764, 774 (1990) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); internal quotation marks omitted).

If a due process violation is found in the State's maintenance of such inconsistent positions, there will be remedial questions. May the death sentence stand if the State declines to repudiate its inconsistent position in the codefendant's case? Would it be sufficient simply to reexamine the original sentence and if so, which party should have the burden of persuasion? If more would be required, would a *de novo* sentencing hearing suffice?

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion. As the Court notes, the State has not argued that *Teague* v. *Lane*, 489 U. S. 288 (1989), forecloses Stumpf's claim that the prosecution's presentation of inconsistent theories violated his right to due process. *Ante*, at 182. With certain narrow exceptions, *Teague* precludes federal courts from granting habeas petitioners relief on the basis of "new" rules of constitutional law established after their convictions become final. 489 U. S., at 310 (plurality opinion). This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories. Moreover, it is "[a] threshold question in every habeas case . . . whether the court is obligated to apply the *Teague* rule to the defendant's claim," and "if the State does argue

that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." *Horn* v. *Banks*, 536 U. S. 266, 271 (2002) *(per curiam)* (internal quotation marks omitted). The State also has not argued that Stumpf procedurally defaulted his due process claim, even though it appears that Stumpf never presented this argument to the Ohio courts. Stumpf did not even raise the inconsistent-theories claim in his first federal habeas filings. See App. to Pet. for Cert. 134a–140a. Instead, the District Court raised the issue for Stumpf *sua sponte*, and ordered supplemental briefing on the point. See App. 97–98. The Court's opinion does not preclude the State from advancing either of these procedural defenses on remand in support of Stumpf's death sentence.

Moreover, I agree with the Court that "Stumpf has never provided an explanation of how the prosecution's postplea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea." *Ante*, at 187. Similar reasoning applies to Stumpf's sentence. Stumpf equally has never explained how the prosecution's use of postsentence inconsistent arguments—which were based on evidence unavailable until after Stumpf was sentenced—could have affected the reliability or procedural fairness of his death sentence. At most, the evidence and purportedly inconsistent theory presented at Wesley's trial would constitute newly discovered evidence casting doubt on the reliability of Stumpf's death sentence, a sort of claim that our precedents and this Nation's traditions have long foreclosed, see *Herrera* v. *Collins*, 506 U. S. 390, 408–417 (1993); *id.*, at 427–428 (SCALIA, J., concurring). The Bill of Rights guarantees vigorous adversarial testing of guilt and innocence and conviction only by proof beyond a reasonable doubt. These guarantees are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for op-

posing counsel will bring the conflict to the factfinder's attention. See *ante*, at 188 (SOUTER, J., concurring) (noting that Wesley's jury was informed that Stumpf had already been sentenced to death for the crime).

Syllabus

MERCK KGaA *v.* INTEGRA LIFESCIENCES I, LTD., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 03–1237. Argued April 20, 2005—Decided June 13, 2005

It is not "an act of [patent] infringement to . . . use . . . or import into the United States a patented invention . . . solely for uses reasonably related to the development and submission of information under a Federal law which regulates the . . . use . . . of drugs." 35 U. S. C. § 271(e)(1). The Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) is such a law. Under the FDCA, a drugmaker must submit research data to the Food and Drug Administration (FDA) in an investigational new drug application (IND) when seeking authorization to conduct human clinical trials, and in a new drug application (NDA) when seeking authorization to market a new drug. Respondents filed a patent-infringement suit, claiming, *inter alia*, that petitioner had willfully infringed their patents by supplying respondents' RGD peptides to other defendants for use in preclinical research. Petitioner answered, among other things, that § 271(e)(1) exempted its actions from infringement. The jury found otherwise and awarded damages. In post-trial motions, the District Court affirmed the jury's award and denied petitioner's motion for judgment as a matter of law. The Federal Circuit affirmed that denial, finding that § 271(e)(1)'s safe harbor did not apply. It reversed the District Court's refusal to modify the damages award and remanded for further proceedings.

Held: The use of patented compounds in preclinical studies is protected under § 271(e)(1) at least as long as there is a reasonable basis to believe that the compound tested could be the subject of an FDA submission and the experiments will produce the types of information relevant to an IND or NDA. The statutory text makes clear that § 271(e)(1) provides a wide berth for the use of patented drugs in activities related to the federal regulatory process, including uses reasonably related to the development and submission of any information under the FDCA. *Eli Lilly & Co.* v. *Medtronic, Inc.*, 496 U. S. 661, 665–669. This necessarily includes preclinical studies, both those pertaining to a drug's safety in humans and those related to, *e. g.*, a drug's efficacy and mechanism of action. Additionally, § 271(e)(1) exempts from infringement the use of patented compounds in preclinical research, even when the patented compounds do not themselves become the subject of an FDA submission.

Syllabus

The "reasonable relation" requirement cannot be read effectively to limit § 271(e)(1)'s stated protection of activities leading to FDA approval for all drugs to those activities leading to FDA approval for generic drugs. Similarly, the use of a patented compound in experiments not themselves included in a "submission of information" to the FDA does not, standing alone, render the use infringing. Because the Federal Circuit applied the wrong standard in rejecting petitioner's challenge to the jury's finding that petitioner failed to show that its activities were covered by § 271(e)(1), the trial evidence has yet to be reviewed under the standard set forth in the jury instruction, and developed in more detail here. Pp. 202–208.

331 F. 3d 860, vacated and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

E. Joshua Rosenkranz argued the cause for petitioner. With him on the briefs were *M. Patricia Thayer, James N. Czaban,* and *Donald R. Dunner.*

Daryl Joseffer argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Hungar, Douglas N. Letter, Mark S. Davies, Alex M. Azar II, Richard Lambert, John M. Whealan,* and *Heather F. Auyang.*

Mauricio A. Flores argued the cause for respondents. With him on the brief were *Raphael V. Lupo, Cathryn Campbell, Mark G. Davis, M. Miller Baker, Richard B. Rogers,* and *David M. Beckwith.**

---

*Briefs of *amici curiae* urging reversal were filed for AARP by *Sarah Lenz Lock, Bruce Vignery,* and *Michael Schuster;* for Eli Lilly and Co. et al. by *James J. Kelley, Thomas G. Plant,* and *John A. Cleveland, Jr.;* for Eon Labs, Inc., by *Shashank Upadhye;* for Genentech, Inc., et al. by *Carter G. Phillips, Virginia A. Seitz, Jeffrey P. Kushan,* and *Gary H. Loeb;* for the New York Intellectual Property Law Association by *David F. Ryan;* and for Pharmaceutical Research and Manufacturers of America by *Roderick R. McKelvie* and *Brooks Mackintosh.*

Briefs of *amici curiae* urging affirmance were filed for Applera Corp. et al. by *Edward R. Reines;* for Benitec Australia Ltd. by *Eric A. Kuwana, Marc R. Labgold,* and *Kevin M. Bell;* for Invitrogen Corp. et al. by *Drew S. Days III, Beth S. Brinkmann, Seth M. Galanter, David C. Doyle,*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether uses of patented inventions in preclinical research, the results of which are not ultimately included in a submission to the Food and Drug Administration (FDA), are exempted from infringement by 35 U. S. C. § 271(e)(1).

I

It is generally an act of patent infringement to "mak[e], us[e], offe[r] to sell, or sel[l] any patented invention . . . during the term of the patent therefor." § 271(a). In 1984, Congress enacted an exemption to this general rule, see Drug Price Competition and Patent Term Restoration Act of 1984, § 202, 98 Stat. 1585, as amended, 35 U. S. C. § 271(e)(1), which provides:

> "It shall not be an act of infringement to make, use, offer to sell, or sell within the United States or import into the United States a patented invention (other than a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Act of March 4, 1913) . . .) solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs . . . ."

---

and *Andrea L. Gross;* for Vaccinex, Inc., by *Kenneth C. Bass III* and *Linda Alcorn;* and for the Wisconsin Alumni Research Foundation et al. by *Rolf O. Stadheim* and *George C. Summerfield.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Donald R. Ware, Denise W. DeFranco,* and *Melvin C. Garner;* for the Biotechnology Industry Organization by *Richard J. Oparil;* for the Consumer Project on Technology et al. by *Joshua D. Sarnoff;* for Intellectual Property Professors by *John Fitzgerald Duffy* and *Katherine J. Strandburg;* for the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia by *Lynn E. Eccleston* and *Susan M. Dadio;* for the San Diego Intellectual Property Law Association by *Madison C. Jellins, Doug E. Olson,* and *John E. Peterson;* and for Sepracor Inc. by *Kenneth J. Burchfiel* and *Michael R. Dzwonczyk.*

The Federal Food, Drug, and Cosmetic Act (FDCA), ch. 675, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.*, is "a Federal law which regulates the manufacture, use, or sale of drugs." See § 355(a); *Eli Lilly & Co.* v. *Medtronic, Inc.*, 496 U. S. 661, 665–666, 674 (1990). Under the FDCA, a drugmaker must submit research data to the FDA at two general stages of new-drug development.[1] First, a drugmaker must gain authorization to conduct clinical trials (tests on humans) by submitting an investigational new drug application (IND). See 21 U. S. C. § 355(i); 21 CFR § 312.1 *et seq.* (2005).[2] The IND must describe "preclinical tests (including tests on animals) of [the] drug adequate to justify the proposed clinical testing." 21 U. S. C. § 355(i)(1)(A); see 21 CFR §§ 312.23(a)(5) and (a)(8) (specifying necessary information from preclinical tests). Second, to obtain authorization to market a new drug, a drugmaker must submit a new drug application (NDA), containing "full reports of investigations which have been made to show whether or not [the] drug is safe for use and whether [the] drug is effective in use." 21 U. S. C. § 355(b)(1). Pursuant to FDA regulations, the NDA must include all clinical studies, as well as preclinical studies related to a drug's efficacy, toxicity, and pharmacological properties. See 21 CFR §§ 314.50(d)(2) (preclinical studies) and (d)(5) (clinical studies).

---

[1] Drugmakers that desire to market a generic drug (a drug containing the same active ingredients as a drug already approved for the market) may file an abbreviated new drug application (ANDA) with the FDA. See 21 U. S. C. § 355(j). The sponsor of a generic drug does not have to make an independent showing that the drug is safe and effective, either in preclinical or clinical studies. See § 355(j)(2)(A). It need only show that the drug includes the same active ingredients as, and is bioequivalent to, the drug that it is mimicking. See §§ 355(j)(2)(A)(ii) and (iv); § 355(j)(8)(B).

[2] We cite the current versions of federal statutes and regulations. The provisions cited are materially unchanged since the period of petitioner's alleged infringement.

II

A

Respondents, Integra Lifesciences I, Ltd., and the Burnham Institute, own five patents related to the tripeptide sequence Arg-Gly-Asp, known in single-letter notation as the "RGD peptide." U. S. Patent Nos. 4,988,621, 4,792,525, 5,695,997, 4,879,237, and 4,789,734, Supp. App. SA11–SA19. The RGD peptide promotes cell adhesion by attaching to $\alpha_v\beta_3$ integrins, receptors commonly located on the outer surface of certain endothelial cells. 331 F. 3d 860, 862–863 (CA Fed. 2003).

Beginning in 1988, petitioner Merck KGaA provided funding for angiogenesis research conducted by Dr. David Cheresh at the Scripps Research Institute (Scripps). *Telios Pharmaceuticals* v. *Merck KGaA*, Case No. 96–CV–1307 (SD Cal., Sept. 9, 1997), App. 30a. Angiogenesis is the process by which new blood vessels sprout from existing vessels; it plays a critical role in many diseases, including solid tumor cancers, diabetic retinopathy, and rheumatoid arthritis. 331 F. 3d, at 863. In the course of his research, Dr. Cheresh discovered that it was possible to inhibit angiogenesis by blocking the $\alpha_v\beta_3$ integrins on proliferating endothelial cells. *Ibid.* In 1994, Dr. Cheresh succeeded in reversing tumor growth in chicken embryos, first using a monoclonal antibody (LM609) he developed himself and later using a cyclic RGD peptide (EMD 66203) provided by petitioner.[3] App. 190a. Dr. Cheresh's discoveries were announced in leading medical journals and received attention in the general media. See Altman, Scientists Report Finding a Way to Shrink Tumors, N. Y. Times, Dec. 30, 1994, p. A1; Brooks et al., Integrin

[3] In the proceedings below, the Court of Appeals held that respondents' patents covered the cyclic RGD peptides developed by petitioner. 331 F. 3d 860, 869 (CA Fed. 2003). Petitioner does not contest that ruling here.

$\alpha_v\beta_3$ Antagonists Promote Tumor Regression by Inducing Apoptosis of Angiogenic Blood Vessels, 79 Cell 1157 (Dec. 30, 1994); Brooks, Clark, & Cheresh, Requirement of Vascular Integrin $\alpha_v\beta_3$ for Angiogenesis, 264 Science 569 (Apr. 22, 1994).

With petitioner's agreement to fund research at Scripps due to expire in July 1995, Dr. Cheresh submitted a detailed proposal for expanded collaboration between Scripps and petitioner on February 1, 1995. App. 95a–107a. The proposal set forth a 3-year timetable in which to develop "integrin antagonists as angiogenesis inhibitors," *id.*, at 105a, beginning with *in vitro* and *in vivo* testing of RGD peptides at Scripps in year one and culminating with the submission of an IND to the FDA in year three, *id.*, at 106a–107a. Petitioner agreed to the material terms of the proposal on February 20, 1995, *id.*, at 124a–125a, and on April 13, 1995, pledged $6 million over three years to fund research at Scripps, *id.*, at 126a. Petitioner's April 13 letter specified that Scripps would be responsible for testing RGD peptides produced by petitioner as potential drug candidates but that, once a primary candidate for clinical testing was in "the pipeline," petitioner would perform the toxicology tests necessary for FDA approval to proceed to clinical trials. *Id.*, at 127a; see 21 CFR §312.23(a)(8)(iii) (2005) (requirement that "nonclinical laboratory study" include a certification that it was performed under good laboratory practices); see also §58.3(d) (2004) (defining "[n]onclinical laboratory study"). Scripps and petitioner concluded an agreement of continued collaboration in September 1995. Case No. 96–CV–1307, App. 31a.

Pursuant to the agreement, Dr. Cheresh directed *in vitro* and *in vivo* experiments on RGD peptides provided by petitioner from 1995 to 1998. These experiments focused on EMD 66203 and two closely related derivatives, EMD 85189 and EMD 121974, and were designed to evaluate the suitability of each of the peptides as potential drug candidates. 331 F. 3d, at 863. Accordingly, the tests measured the efficacy,

specificity, and toxicity of the particular peptides as angiogenesis inhibitors, and evaluated their mechanism of action and pharmacokinetics in animals. *Ibid.* Based on the test results, Scripps decided in 1997 that EMD 121974 was the most promising candidate for testing in humans. *Ibid.* Over the same period, Scripps performed similar tests on LM609, a monoclonal antibody developed by Dr. Cheresh.[4] App. 277a, 285a–298a. Scripps also conducted more basic research on organic mimetics designed to block $\alpha_v\beta_3$ integrins in a manner similar to the RGD peptides, *id.*, at 223a–224a; it appears that Scripps used the RGD peptides in these tests as "positive controls" against which to measure the efficacy of the mimetics, *id.*, at 188a.

In November 1996, petitioner initiated a formal project to guide one of its RGD peptides through the regulatory approval process in the United States and Europe. *Id.*, at 129a. Petitioner originally directed its efforts at EMD 85189, but switched focus in April 1997 to EMD 121974. Case No. 96–CV–1307, App. 31a. Petitioner subsequently discussed EMD 121974 with officials at the FDA. *Id.*, at 397a. In October 1998, petitioner shared its research on RGD peptides with the National Cancer Institute (NCI), which agreed to sponsor clinical trials. *Id.*, at 214a–217a. Although the fact was excluded from evidence at trial, the lower court's opinion reflects that NCI filed an IND for EMD 121974 in 1998. 331 F. 3d, at 874 (Newman, J., dissenting).

---

[4] Scripps licensed the patent for the monoclonal antibody to Ixsys, a California biotechnology company. App. 271a. Based on research conducted at Scripps and at Ixsys in consultation with Dr. Cheresh, an IND application for a humanized version of the antibody called Vitaxin was filed with the FDA on December 30, 1996. *Id.*, at 271a–274a, 404a. In addition to toxicology tests, the application included information from Dr. Cheresh's *in vitro* and *in vivo* experiments related to the antibody's mechanism of action and efficacy as an inhibitor of angiogenesis. *Id.*, at 399a–404a. Ixsys began clinical testing of the antibody as an angiogenesis inhibitor in February 1997. *Id.*, at 304a.

B

On July 18, 1996, respondents filed a patent-infringement suit against petitioner, Scripps, and Dr. Cheresh in the District Court for the Southern District of California. Respondents' complaint alleged that petitioner willfully infringed and induced others to infringe respondents' patents by supplying the RGD peptide to Scripps, and that Dr. Cheresh and Scripps infringed the same patents by using the RGD peptide in experiments related to angiogenesis. Respondents sought damages from petitioner and a declaratory judgment against Dr. Cheresh and Scripps. *Id.*, at 863. Petitioner answered that its actions involving the RGD peptides did not infringe respondents' patents, and that in any event they were protected by the common-law research exemption and 35 U. S. C. § 271(e)(1). 331 F. 3d, at 863.

At the conclusion of trial, the District Court held that, with one exception, petitioner's pre-1995 actions related to the RGD peptides were protected by the common-law research exemption, but that a question of fact remained as to whether petitioner's use of the RGD peptides after 1995 fell within the § 271(e)(1) safe harbor. With the consent of the parties, the District Court gave the following instruction regarding the § 271(e)(1) exemption:

> "To prevail on this defense, [petitioner] must prove by a preponderance of the evidence that it would be objectively reasonable for a party in [petitioner's] and Scripps' situation to believe that there was a decent prospect that the accused activities would contribute, relatively directly, to the generation of the kinds of information that are likely to be relevant in the processes by which the FDA would decide whether to approve the product in question.
>
> "Each of the accused activities must be evaluated separately to determine whether the exemption applies.

> "[Petitioner] does not need to show that the information gathered from a particular activity was actually submitted to the FDA." App. 57a (one paragraph break omitted).

The jury found that petitioner, Dr. Cheresh, and Scripps infringed respondents' patents and that petitioner had failed to show that its activities were protected by § 271(e)(1). It awarded damages of $15 million.

In response to post-trial motions, the District Court dismissed respondents' suit against Dr. Cheresh and Scripps, but affirmed the jury's damages award as supported by substantial evidence, Civ. Action No. 961307 JMF (SD Cal., Mar. 26, 2001), App. to Pet. for Cert. 52a, and denied petitioner's motion for judgment as a matter of law, Civ. Action No. 96CV–1307 JMF (SD Cal., Mar. 6, 2001), App. to Pet. for Cert. 50a. With respect to the last, the District Court explained that the evidence was sufficient to show that "any connection between the infringing Scripps experiments and FDA review was insufficiently direct to qualify for the [§ 271(e)(1) exemption]." *Id.*, at 49a.

A divided panel of the Court of Appeals for the Federal Circuit affirmed in part and reversed in part. The panel majority affirmed the denial of judgment as a matter of law to petitioner, on the ground that § 271(e)(1)'s safe harbor did not apply because "the Scripps work sponsored by [petitioner] was not clinical testing to supply information to the FDA, but only general biomedical research to identify new pharmaceutical compounds." 331 F. 3d, at 866. It reversed the District Court's refusal to modify the damages award and remanded for further proceedings.[5] *Id.*, at 872. Judge Newman dissented on both points. See *id.*, at 874, 877. The panel unanimously affirmed the District Court's ruling

---

[5] On remand, the District Court reduced the damages award to $6.375 million. Civ. Action No. CV.96 CV 1307–B(AJB), 2004 WL 2284001, *1 (SD Cal., Sept. 7, 2004).

that respondents' patents covered the cyclic RGD peptides developed by petitioner. *Id.*, at 868–869; *id.*, at 873, n. 7 (Newman, J., dissenting). We granted certiorari to review the Court of Appeals' construction of § 271(e)(1). 543 U. S. 1041 (2004).

III

As described earlier, 35 U. S. C. § 271(e)(1) provides that "[i]t shall not be an act of infringement to . . . use . . . or import into the United States a patented invention . . . solely for uses reasonably related to the development and submission of information under a Federal law which regulates the . . . use . . . of drugs." Though the contours of this provision are not exact in every respect, the statutory text makes clear that it provides a wide berth for the use of patented drugs in activities related to the federal regulatory process.

As an initial matter, we think it apparent from the statutory text that § 271(e)(1)'s exemption from infringement extends to all uses of patented inventions that are reasonably related to the development and submission of *any* information under the FDCA. Cf. *Eli Lilly*, 496 U. S., at 665–669 (declining to limit § 271(e)(1)'s exemption from infringement to submissions under particular statutory provisions that regulate drugs). This necessarily includes preclinical studies of patented compounds that are appropriate for submission to the FDA in the regulatory process. There is simply no room in the statute for excluding certain information from the exemption on the basis of the phase of research in which it is developed or the particular submission in which it could be included.[6]

---

[6] Although the Court of Appeals' opinion suggests in places that § 271(e)(1)'s exemption from infringement is limited to research conducted in *clinical* trials, see 331 F. 3d, at 866, we do not understand it to have adopted that position. The Court of Appeals recognized that information included in an IND would come within § 271(e)(1)'s safe harbor. *Ibid.* Because an IND must be filed *before* clinical trials may begin, such information would necessarily be developed in preclinical studies.

Respondents concede the breadth of § 271(e)(1) in this regard, but argue that the only preclinical data of interest to the FDA is that which pertains to the safety of the drug in humans. In respondents' view, preclinical studies related to a drug's efficacy, mechanism of action, pharmacokinetics, and pharmacology are not reasonably included in an IND or an NDA, and are therefore outside the scope of the exemption. We do not understand the FDA's interest in information gathered in preclinical studies to be so constrained. To be sure, its regulations provide that the agency's "primary objectives in reviewing an IND are . . . to assure the safety and rights of subjects," 21 CFR § 312.22(a) (2005), but it does not follow that the FDA is not interested in reviewing information related to other characteristics of a drug. To the contrary, the FDA requires that applicants include in an IND summaries of the pharmacological, toxicological, pharmacokinetic, and biological qualities of the drug in animals. See § 312.23(a)(5); U. S. Dept. of Health and Human Services, Guidance for Industry, Good Clinical Practice: Consolidated Guidance 45 (Apr. 1996) ("The results of all relevant nonclinical pharmacology, toxicology, pharmacokinetic, and investigational product metabolism studies should be provided in summary form. This summary should address the methodology used, the results, and a discussion of the relevance of the findings to the investigated therapeutic and the possible unfavorable and unintended effects in humans"). The primary (and, in some cases, only) way in which a drugmaker may obtain such information is through preclinical *in vitro* and *in vivo* studies.

Moreover, the FDA does not evaluate the safety of proposed clinical experiments in a vacuum; rather, as the statute and regulations reflect, it asks whether the proposed clinical trial poses an "unreasonable risk." 21 U. S. C. § 355(i)(3)(B)(i); see also 21 CFR § 312.23(a)(8) (2005) (requiring applicants to include pharmacological and toxicological studies that serve as the basis of their conclusion that clinical

testing would be "reasonably safe"); § 56.111(a)(2) (2004) (providing that the Institutional Review Boards that oversee clinical trials must consider whether the "[r]isks to subjects are reasonable in relation to anticipated benefits"). This assessment involves a comparison of the risks and the benefits associated with the proposed clinical trials. As the Government's brief, filed on behalf of the FDA, explains, the "FDA might allow clinical testing of a drug that posed significant safety concerns if the drug had a sufficiently positive potential to address a serious disease, although the agency would not accept similar risks for a drug that was less likely to succeed or that would treat a less serious medical condition." Brief for United States as *Amicus Curiae* 10. Accordingly, the FDA directs that an IND must provide sufficient information for the investigator to "make his/her own unbiased risk-benefit assessment of the appropriateness of the proposed trial." Guidance for Industry, *supra*, at 43. Such information necessarily includes preclinical studies of a drug's efficacy in achieving particular results.

Respondents contend that, even accepting that the FDA is interested in preclinical research concerning drug characteristics other than safety, the experiments in question here are necessarily disqualified because they were not conducted in conformity with the FDA's good laboratory practices regulations. This argument fails for at least two reasons. First, the FDA's requirement that preclinical studies be conducted under "good laboratory practices" applies only to experiments on drugs "to determine their safety," 21 CFR § 58.3(d) (2004). See § 58.1(a); § 312.23(a)(8)(iii) (2005) (only "nonclinical laboratory study subject to the good laboratory practice regulations under part 58" must certify compliance with good laboratory practice regulations). The good laboratory practice regulations do not apply to preclinical studies of a drug's efficacy, mechanism of action, pharmacology, or pharmacokinetics. Second, FDA regulations do not provide that even safety-related experiments not conducted in compliance

with good laboratory practices regulations are not suitable for submission in an IND. Rather, such studies must include "a brief statement of the reason for the noncompliance." *Ibid.*

The Court of Appeals' conclusion that § 271(e)(1) did not protect petitioner's provision of the patented RGD peptides for research at Scripps appeared to rest on two somewhat related propositions. First, the court credited the fact that the "Scripps-Merck experiments did not supply information for submission to the [FDA], but instead identified the best drug candidate to subject to future clinical testing under the FDA processes." 331 F. 3d, at 865; see also *id.*, at 866 (similar). The court explained:

> "The FDA has no interest in the hunt for drugs that may or may not later undergo clinical testing for FDA approval. For instance, the FDA does not require information about drugs other than the compound featured in an [IND] application. Thus, the Scripps work sponsored by [petitioner] was not 'solely for uses reasonably related' to clinical testing for FDA." *Ibid.*

Second, the court concluded that the exemption "does not globally embrace all experimental activity that at some point, however attenuated, may lead to an FDA approval process." *Id.*, at 867.[7]

We do not quibble with the latter statement. Basic scientific research on a particular compound, performed without

---

[7] The Court of Appeals also suggested that a limited construction of § 271(e)(1) is necessary to avoid depriving so-called "research tools" of the complete value of their patents. Respondents have never argued the RGD peptides were used at Scripps as research tools, and it is apparent from the record that they were not. See 331 F. 3d, at 878 (Newman, J., dissenting) ("Use of an existing tool in one's research is quite different from study of the tool itself"). We therefore need not—and do not—express a view about whether, or to what extent, § 271(e)(1) exempts from infringement the use of "research tools" in the development of information for the regulatory process.

the intent to develop a particular drug or a reasonable belief that the compound will cause the sort of physiological effect the researcher intends to induce, is surely not "reasonably related to the development and submission of information" to the FDA. It does not follow from this, however, that § 271(e)(1)'s exemption from infringement categorically excludes either (1) experimentation on drugs that are not ultimately the subject of an FDA submission or (2) use of patented compounds in experiments that are not ultimately submitted to the FDA. Under certain conditions, we think the exemption is sufficiently broad to protect the use of patented compounds in both situations.

As to the first proposition, it disregards the reality that, even at late stages in the development of a new drug, scientific testing is a process of trial and error. In the vast majority of cases, neither the drugmaker nor its scientists have any way of knowing whether an initially promising candidate will prove successful over a battery of experiments. That is the reason they conduct the experiments. Thus, to construe § 271(e)(1), as the Court of Appeals did, not to protect research conducted on patented compounds for which an IND is not ultimately filed is effectively to limit assurance of exemption to the activities necessary to seek approval of a generic drug: One can know at the outset that a particular compound will be the subject of an eventual application to the FDA only if the active ingredient in the drug being tested is identical to that in a drug that has already been approved.

The statutory text does not require such a result. Congress did not limit § 271(e)(1)'s safe harbor to the development of information for inclusion in a submission to the FDA; nor did it create an exemption applicable only to the research relevant to filing an ANDA for approval of a generic drug. Rather, it exempted from infringement *all* uses of patented compounds "reasonably related" to the process of developing information for submission under *any* federal law regulating the manufacture, use, or distribution of drugs. See *Eli*

Lilly, 496 U. S., at 674. We decline to read the "reasonable relation" requirement so narrowly as to render §271(e)(1)'s stated protection of activities leading to FDA approval for all drugs illusory. Properly construed, §271(e)(1) leaves adequate space for experimentation and failure on the road to regulatory approval: At least where a drugmaker has a reasonable basis for believing that a patented compound may work, through a particular biological process, to produce a particular physiological effect, and uses the compound in research that, if successful, would be appropriate to include in a submission to the FDA, that use is "reasonably related" to the "development and submission of information under . . . Federal law." §271(e)(1).

For similar reasons, the use of a patented compound in experiments that are not themselves included in a "submission of information" to the FDA does not, standing alone, render the use infringing. The relationship of the use of a patented compound in a particular experiment to the "development and submission of information" to the FDA does not become more attenuated (or less reasonable) simply because the data from that experiment are left out of the submission that is ultimately passed along to the FDA. Moreover, many of the uncertainties that exist with respect to the selection of a specific drug exist as well with respect to the decision of what research to include in an IND or NDA. As a District Court has observed, "[I]t will not always be clear to parties setting out to seek FDA approval for their new product exactly which kinds of information, and in what quantities, it will take to win that agency's approval." *Intermedics, Inc.* v. *Ventritex, Inc.*, 775 F. Supp. 1269, 1280 (ND Cal. 1991), aff'd, 991 F. 2d 808 (CA Fed. 1993). This is especially true at the preclinical stage of drug approval. FDA regulations provide only that "[t]he amount of information on a particular drug that must be submitted in an IND . . . depends upon such factors as the novelty of the drug, the extent to which it has been studied previously, the known or

suspected risks, and the developmental phase of the drug." 21 CFR §312.22(b). We thus agree with the Government that the use of patented compounds in preclinical studies is protected under §271(e)(1) as long as there is a reasonable basis for believing that the experiments will produce "the types of information that are relevant to an IND or NDA." Brief for United States as *Amicus Curiae* 23 (emphasis deleted).

* * *

Before the Court of Appeals, petitioner challenged the sufficiency of the evidence supporting the jury's finding that it failed to show that "all of the accused activities are covered by [§271(e)(1)]." App. 62a. That court rejected the challenge on the basis of a construction of §271(e)(1) that was not consistent with the text of that provision or the relevant jury instruction.[8] Thus, the evidence presented at trial has yet to be reviewed under the standards set forth in the jury instruction, which we believe to be consistent with, if less detailed than, the construction of §271(e)(1) that we adopt today. We decline to undertake a review of the sufficiency of the evidence under a proper construction of §271(e)(1) for the first time here. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

---

[8]The relevant jury instruction provided only that there must be a "decent prospect that the accused activities would contribute, relatively directly, to the generation of the kinds of information that are likely to be relevant in the processes by which the FDA would decide whether to approve the product in question." App. 57a. It did not say that, to fall within §271(e)(1)'s exemption from infringement, the patented compound used in experimentation must be the subject of an eventual application to the FDA. And it expressly rejected the notion that the exemption only included experiments that produced information included in an IND or NDA. *Ibid.*

Syllabus

WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. *v.* AUSTIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–495. Argued March 30, 2005—Decided June 13, 2005

"Supermax" prisons are maximum-security facilities with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population. Their use has increased in recent years, in part as a response to the rise in prison gangs and prison violence. Ohio opened its only Supermax facility, the Ohio State Penitentiary (OSP), after a riot in one of its maximum-security prisons. In the OSP almost every aspect of an inmate's life is controlled and monitored. Incarceration there is synonymous with extreme isolation. Opportunities for visitation are rare and are always conducted through glass walls. Inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact. Placement at OSP is for an indefinite period, limited only by an inmate's sentence. Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP.

When OSP first became operational, no official policy governing placement there was in effect, and the procedures used to assign inmates to the facility were inconsistent and undefined, resulting in haphazard and erroneous placements. In an effort to establish guidelines for the selection and classification of OSP inmates, Ohio issued its Policy 111–07. Relevant here are two versions of the policy: the "Old Policy" and the "New Policy." Because assignment problems persisted after the Old Policy took effect, Ohio promulgated the New Policy to provide more guidance regarding the factors to be considered in placement decisions and to afford inmates more procedural protection against erroneous placement. Under the New Policy, a prison official conducts a classification review either (1) upon entry into the prison system if the inmate was convicted of certain offenses, *e. g.*, organized crime, or (2) during the incarceration if the inmate engages in specified conduct, *e. g.*, leads a prison gang. The New Policy also provides for a three-tier review process after a recommendation that an inmate be placed in OSP. Among other things, the inmate must receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal at a hearing, although he may not call witnesses. In addition, the inmate is invited to submit objections prior to the final level of re-

view. Although a subsequent reviewer may overturn an affirmative recommendation for OSP placement at any level, the reverse is not true; if one reviewer declines to recommend OSP placement, the process terminates. Ohio also provides for a placement review within 30 days of an inmate's initial assignment to OSP, and annual review thereafter.

A class of current and former OSP inmates filed this suit for equitable relief under 42 U. S. C. § 1983, alleging, *inter alia*, that the Old Policy, which was then in effect, violated the Fourteenth Amendment's Due Process Clause. On the eve of trial, Ohio promulgated its New Policy and represented that it contained the procedures to be followed in the future. After extensive evidence was presented, the District Court made findings and conclusions and issued a detailed remedial order. First, relying on *Sandin* v. *Conner*, 515 U. S. 472, the court found that inmates have a liberty interest in avoiding assignment to OSP. Second, it found Ohio had denied the inmates due process by failing to afford many of them notice and an adequate opportunity to be heard before transfer; failing to give them sufficient notice of the grounds for their retention at OSP; and failing to give them sufficient opportunity to understand the reasoning and evidence used to retain them at OSP. Third, it held that, although the New Policy provided more procedural safeguards than the Old Policy, it was nonetheless inadequate to meet procedural due process requirements. The court therefore ordered modifications to the New Policy, including substantive modifications narrowing the grounds that Ohio could consider in recommending assignment to OSP, and various specific procedural modifications. The Sixth Circuit affirmed the District Court's conclusion that the inmates had a liberty interest in avoiding OSP placement and upheld the lower court's procedural modifications in their entirety, but set aside the far-reaching substantive modifications on the ground they exceeded the District Court's authority.

Held: The procedures by which Ohio's New Policy classifies prisoners for placement at its Supermax facility provide prisoners with sufficient protection to comply with the Due Process Clause. Pp. 221–230.

(a) Inmates have a constitutionally protected liberty interest in avoiding assignment at OSP. Such an interest may arise from state policies or regulations, subject to the important limitations set forth in *Sandin*, which requires a determination whether OSP assignment "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U. S., at 483. The Court is satisfied that assignment to OSP imposes such a hardship compared to any plausible baseline from which to measure the Ohio prison system. For an inmate placed in OSP, almost all human contact is prohibited,

even to the point that conversation is not permitted from cell to cell; his cell's light may be dimmed, but is on for 24 hours; and he may exercise only one hour per day in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in segregated confinement at issue in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. Taken together these conditions impose an atypical and significant hardship within the correctional context. Pp. 221–224.

(b) The New Policy's procedures are sufficient to satisfy due process. Evaluating the sufficiency of particular prison procedures requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. Applying those factors demonstrates that Ohio's New Policy provides a sufficient level of process. First, the inmate's interest in avoiding erroneous placement at OSP, while more than minimal, must nonetheless be evaluated within the context of the prison system and its attendant curtailment of liberties. The liberty of prisoners in lawful confinement is curtailed by definition, so their procedural protections are more limited than in cases where the right at stake is the right to be free from all confinement. Second, the risk of an erroneous placement is minimized by the New Policy's requirements. Ohio provides multiple levels of review for any decision recommending OSP placement, with power to overturn the recommendation at each level. In addition, Ohio reduces the risk of erroneous placement by providing for a placement review within 30 days of an inmate's initial assignment to OSP. Notice of the factual basis for a decision and a fair opportunity for rebuttal are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. See, *e. g.*, *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 15. Third, in the context of prison management and the specific circumstances of this case, Ohio's interest is a dominant consideration. Ohio's first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves. See *Hewitt* v. *Helms*, 459 U. S. 460, 473. Prison security, imperiled by the brutal reality of prison gangs, provides the

backdrop of the State's interest. Another component of Ohio's interest is the problem of scarce resources. The high cost of maintaining an inmate at OSP would make it difficult to fund more effective education and vocational assistance programs to improve prisoners' lives. Courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior. Were Ohio required to provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated. Where, as here, the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel, the informal, nonadversary procedures set forth in *Greenholtz* and *Hewitt* provide the appropriate model. If an inmate were to demonstrate that the New Policy did not in practice operate in the fashion described, any cognizable injury could be the subject of an appropriate future challenge. In light of the foregoing, the procedural modifications ordered by the District Court and affirmed by the Sixth Circuit were in error. Pp. 224–230.

372 F. 3d 346, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

Jim Petro, Attorney General of Ohio, argued the cause for petitioners. With him on the briefs were *Douglas R. Cole*, State Solicitor, *Stephen P. Carney*, Senior Deputy Solicitor, and *Todd R. Marti* and *Franklin E. Crawford*, Assistant Solicitors.

Deanne E. Maynard argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, *Jonathan L. Marcus*, and *Steven L. Lane*.

Jules Lobel argued the cause for respondents. With him on the brief was *Staughton Lynd*.*

---

*A brief of *amici curiae* urging reversal was filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Frances T. Grunder*, Senior Assistant Attorney Gen-

JUSTICE KENNEDY delivered the opinion of the Court.

This case involves the process by which Ohio classifies prisoners for placement at its highest security prison, known as a "Supermax" facility. Supermax facilities are maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population. We must consider what process the Fourteenth Amendment to the United States Constitution requires Ohio to afford to inmates before assigning them to Supermax. We hold that the procedures Ohio has adopted provide sufficient procedural protection to comply with due process requirements.

I

The use of Supermax prisons has increased over the last 20 years, in part as a response to the rise in prison gangs and prison violence. See generally U. S. Dept. of Justice, National Institute of Corrections, C. Riveland, Supermax Prisons: Overview and General Considerations 1 (1999), http://www.nicic.org/pubs/1999/014937.pdf (as visited June 9, 2005, and available in Clerk of Court's case file). About 30 States now operate Supermax prisons, in addition to the two somewhat comparable facilities operated by the Federal Gov-

---

eral, and *Thomas S. Patterson*, Supervising Deputy Attorney General, by *John W. Suthers*, Interim Attorney General of Colorado, and by the Attorneys General for their respective States as follows: *Gregg D. Renkes* of Alaska, *Terry Goddard* of Arizona, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Greg Abbott* of Texas, *Jerry W. Kilgore* of Virginia, and *Rob McKenna* of Washington.

Briefs of *amici curiae* urging affirmance were filed for Corrections Professionals by *Walter J. Dickey;* for Human Rights Watch et al. by *Geoffrey F. Aronow, Molly Wieser, Thomas F. Geraghty,* and *Andrea D. Lyon;* for Professors and Practitioners of Psychology and Psychiatry by *Michael E. Deutsch;* and for Percy Pitzer by *Joseph Margulies.*

ernment. See Brief for United States as *Amicus Curiae* 2. In 1998, Ohio opened its only Supermax facility, the Ohio State Penitentiary (OSP), after a riot in one of its maximum-security prisons. OSP has the capacity to house up to 504 inmates in single-inmate cells and is designed to "'separate the most predatory and dangerous prisoners from the rest of the . . . general [prison] population.'" See 189 F. Supp. 2d 719, 723 (ND Ohio 2002) *(Austin I)* (quoting deposition of R. Wilkinson, pp. 24–25).

Conditions at OSP are more restrictive than any other form of incarceration in Ohio, including conditions on its death row or in its administrative control units. The latter are themselves a highly restrictive form of solitary confinement. See *Austin I*, *supra*, at 724–725, and n. 5 (citing Ohio Admin. Code §5120–9–13 (2001) (rescinded 2004)). In OSP almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an

inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there. *Austin I*, *supra*, at 740. Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP. 189 F. Supp. 2d, at 728.

Placement at OSP is determined in the following manner: Upon entering the prison system, all Ohio inmates are assigned a numerical security classification from level 1 through level 5, with 1 the lowest security risk and 5 the highest. See Brief for Petitioners 7. The initial security classification is based on numerous factors (*e. g.*, the nature of the underlying offense, criminal history, or gang affiliation) but is subject to modification at any time during the inmate's prison term if, for instance, he engages in misconduct or is deemed a security risk. *Ibid.* Level 5 inmates are placed in OSP, and levels 1 through 4 inmates are placed at lower security facilities throughout the State. *Ibid.*

Ohio concedes that when OSP first became operational, the procedures used to assign inmates to the facility were inconsistent and undefined. For a time, no official policy governing placement was in effect. See *Austin I*, *supra*, at 726–727. Haphazard placements were not uncommon, and some individuals who did not pose high-security risks were designated, nonetheless, for OSP. In an effort to establish guidelines for the selection and classification of inmates suitable for OSP, Ohio issued Department of Rehabilitation and Correction Policy 111–07 (Aug. 31, 1998). This policy has been revised at various points but relevant here are two versions: the "Old Policy" and the "New Policy." The Old Policy took effect on January 28, 1999, but problems with assignment appear to have persisted even under this written set of standards. 189 F. Supp. 2d, at 727–736. After forming a committee to study the matter and retaining a national expert in prison security, Ohio promulgated the New Policy in early 2002. The New Policy provided more guidance re-

garding the factors to be considered in placement decisions and afforded inmates more procedural protection against erroneous placement at OSP.

Although the record is not altogether clear regarding the precise manner in which the New Policy operates, we construe it based on the policy's text, the accompanying forms, and the parties' representations at oral argument and in their briefs. The New Policy appears to operate as follows: A classification review for OSP placement can occur either (1) upon entry into the prison system if the inmate was convicted of certain offenses, *e. g.*, organized crime, or (2) during the term of incarceration if an inmate engages in specified conduct, *e. g.*, leads a prison gang. App. 42–43. The review process begins when a prison official prepares a "Security Designation Long Form" (Long Form). *Id.*, at 20. This three-page form details matters such as the inmate's recent violence, escape attempts, gang affiliation, underlying offense, and other pertinent details. *Id.*, at 20, 38–45.

A three-member Classification Committee (Committee) convenes to review the proposed classification and to hold a hearing. At least 48 hours before the hearing, the inmate is provided with written notice summarizing the conduct or offense triggering the review. *Id.*, at 22, 58. At the time of notice, the inmate also has access to the Long Form, which details why the review was initiated. See Tr. of Oral Arg. 13–17. The inmate may attend the hearing, may "offer any pertinent information, explanation and/or objections to [OSP] placement," and may submit a written statement. App. 22. He may not call witnesses.

If the Committee does not recommend OSP placement, the process terminates. *Id.*, at 62, 65. See also Brief for Petitioners 9. If the Committee does recommend OSP placement, it documents the decision on a "Classification Committee Report" (CCR), setting forth "the nature of the threat the inmate presents and the committee's reasons for the recommendation," App. 64, as well as a summary of any informa-

tion presented at the hearing, *id.*, at 59–65. The Committee sends the completed CCR to the warden of the prison where the inmate is housed or, in the case of an inmate just entering the prison system, to another designated official. *Id.*, at 23.

If, after reviewing the CCR, the warden (or the designated official) disagrees and concludes that OSP is inappropriate, the process terminates and the inmate is not placed in OSP. If the warden agrees, he indicates his approval on the CCR, provides his reasons, and forwards the annotated CCR to the Bureau of Classification (Bureau) for a final decision. *Id.*, at 64. (The Bureau is a body of Ohio prison officials vested with final decisionmaking authority over all Ohio inmate assignments.) The annotated CCR is served upon the inmate, notifying him of the Committee's and warden's recommendations and reasons. *Id.*, at 65. The inmate has 15 days to file any objections with the Bureau. *Ibid.*

After the 15-day period, the Bureau reviews the CCR and makes a final determination. If it concludes OSP placement is inappropriate, the process terminates. If the Bureau approves the warden's recommendation, the inmate is transferred to OSP. The Bureau's chief notes the reasons for the decision on the CCR, and the CCR is again provided to the inmate. *Ibid.*

Inmates assigned to OSP receive another review within 30 days of their arrival. That review is conducted by a designated OSP staff member, who examines the inmate's file. *Id.*, at 25. If the OSP staff member deems the inmate inappropriately placed, he prepares a written recommendation to the OSP warden that the inmate be transferred to a lower security institution. Brief for Petitioners 9; App. 25. If the OSP warden concurs, he forwards that transfer recommendation to the Bureau for appropriate action. If the inmate is deemed properly placed, he remains in OSP and his placement is reviewed on at least an annual basis according to the initial three-tier classification review process outlined above. Brief for Petitioners 9–10.

II

This action began when a class of current and former OSP inmates brought suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, in the United States District Court for the Northern District of Ohio against various Ohio prison officials. We refer to the class of plaintiff inmates, respondents here, collectively as "the inmates." We refer to the prison officials, petitioners here, as "Ohio."

The inmates' complaint alleged that Ohio's Old Policy, which was in effect at the time the suit was brought, violated due process. In addition the inmates brought a claim that certain conditions at OSP violated the Eighth Amendment's ban on cruel and unusual punishments, but that claim was settled in the District Court. The extent to which the settlement resolved the practices that were the subject of the inmates' Eighth Amendment claim is unclear but, in any event, that issue is not before us. The inmates' suit sought declaratory and injunctive relief. On the eve of trial Ohio promulgated its New Policy and represented that it contained the procedures to be followed in the future. The District Court and Court of Appeals evaluated the adequacy of the New Policy, and it therefore forms the basis for our determination here.

After an 8-day trial with extensive evidence, including testimony from expert witnesses, the District Court made findings and conclusions and issued a detailed remedial order. First, relying on this Court's decision in *Sandin* v. *Conner*, 515 U. S. 472 (1995), the District Court found that the inmates have a liberty interest in avoiding assignment to OSP. *Austin I*, 189 F. Supp. 2d, at 738–740. Second, the District Court found Ohio had denied the inmates due process by failing to afford a large number of them notice and an adequate opportunity to be heard before transfer; failing to give inmates sufficient notice of the grounds serving as the basis for their retention at OSP; and failing to give the inmates sufficient opportunity to understand the reasoning and evi-

dence used to retain them at OSP. *Id.*, at 749. Third, the District Court held that, although Ohio's New Policy provided more procedural safeguards than its Old Policy, it was nonetheless inadequate to meet procedural due process requirements. *Id.*, at 736, 750–754. In a separate order it directed extensive modifications to that policy. 204 F. Supp. 2d 1024 (ND Ohio 2002).

The modifications the District Court ordered to Ohio's New Policy included both substantive and procedural reforms. The former narrowed the grounds that Ohio could consider in recommending assignment to OSP. For instance, possession of drugs in small amounts, according to the District Court, could not serve as the basis for an OSP assignment. *Id.*, at 1028. The following are some of the procedural modifications the District Court ordered:

(1) Finding that the notice provisions of Ohio's New Policy were inadequate, the District Court ordered Ohio to provide the inmates with an exhaustive list of grounds believed to justify placement at OSP and a summary of all evidence upon which the Committee would rely. Matters not so identified, the District Court ordered, could not be considered by the Committee. *Id.*, at 1026.

(2) The District Court supplemented the inmate's opportunity to appear before the Committee and to make an oral or written statement by ordering Ohio to allow inmates to present documentary evidence and call witnesses before the Committee, provided that doing so would not be unduly hazardous or burdensome. The District Court further ordered that Ohio must attempt to secure the participation of any witness housed within the prison system. *Id.*, at 1026–1027.

(3) Finding the New Policy's provision of a brief statement of reasons for a recommendation of OSP placement inadequate, the District Court ordered the Committee to summarize all evidence supporting its recommendation. *Id.*, at 1027. Likewise, the District Court ordered the Bureau to prepare a "detailed and specific" statement "set[ting]

out all grounds" justifying OSP placement including "facts relied upon and reasoning used." *Ibid.* The statement shall "not use conclusory," "vague," or "boilerplate language," and must be delivered to the inmate within five days. *Id.*, at 1027–1028.

(4) The District Court supplemented the New Policy's 30-day and annual review processes, ordering Ohio to notify the inmate twice per year both in writing and orally of his progress toward a security level reduction. Specifically, that notice must "advise the inmate what specific conduct is necessary for that prisoner to be reduced from Level 5 and the amount of time it will take before [Ohio] reduce[s] the inmate's security level classification." *Id.*, at 1028.

Ohio appealed. First, it maintained that the inmates lacked a constitutionally protected liberty interest in avoiding placement at OSP. Second, it argued that, even assuming a liberty interest, its New Policy provides constitutionally adequate procedures and thus the District Court's modifications were unnecessary. The Court of Appeals for the Sixth Circuit affirmed the District Court's conclusion that the inmates had a liberty interest in avoiding placement at OSP. 372 F. 3d 346, 356 (2004). The Court of Appeals also affirmed the District Court's procedural modifications in their entirety. *Id.*, at 359–360. Finally, it set aside the District Court's far-reaching substantive modifications, concluding they exceeded the scope of the District Court's authority. This last aspect of the Court of Appeals' ruling is not the subject of review in this Court.

We granted certiorari to consider what process an inmate must be afforded under the Due Process Clause when he is considered for placement at OSP. 543 U. S. 1032 (2004). For reasons discussed below, we conclude that the inmates have a protected liberty interest in avoiding assignment at OSP. We further hold that the procedures set forth in the New Policy are sufficient to satisfy the Constitution's requirements; it follows, then, that the procedural modifica-

tions ordered by the District Court and affirmed by the Court of Appeals were in error.

III

Withdrawing from the position taken in the Court of Appeals, Ohio in its briefs to this Court conceded that the inmates have a liberty interest in avoiding assignment at OSP. See Pet. for Cert. i; Brief for Petitioners i. The United States, supporting Ohio as *amicus curiae*, disagrees with Ohio's concession and argues that the inmates have no liberty interest in avoiding assignment to a prison facility with more restrictive conditions of confinement. See Brief for United States 10. At oral argument Ohio initially adhered to its earlier concession, see Tr. of Oral Arg. 5, but when pressed, the State backtracked. See *id.*, at 6–7. We need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest, so it is appropriate to address this threshold question at the outset.

The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty," see, *e. g.*, *Vitek* v. *Jones*, 445 U. S. 480, 493–494 (1980) (liberty interest in avoiding involuntary psychiatric treatment and transfer to mental institution), or it may arise from an expectation or interest created by state laws or policies, see, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 556–558 (1974) (liberty interest in avoiding withdrawal of state-created system of good-time credits).

We have held that the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement. *Meachum* v. *Fano*, 427 U. S. 215, 225 (1976) (no liberty interest arising from Due Process Clause itself in transfer from low- to maximum-security

prison because "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose"). We have also held, however, that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin* v. *Conner*, 515 U. S. 472 (1995).

Sandin involved prisoners' claims to procedural due process protection before placement in segregated confinement for 30 days, imposed as discipline for disruptive behavior. *Sandin* observed that some of our earlier cases, *Hewitt* v. *Helms*, 459 U. S. 460 (1983), in particular, had employed a methodology for identifying state-created liberty interests that emphasized "the language of a particular [prison] regulation" instead of "the nature of the deprivation." *Sandin*, 515 U. S., at 481. In *Sandin*, we criticized this methodology as creating a disincentive for States to promulgate procedures for prison management, and as involving the federal courts in the day-to-day management of prisons. *Id.*, at 482–483. For these reasons, we abrogated the methodology of parsing the language of particular regulations.

> "[T]he search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established in and applied in *Wolff* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in rela-

> tion to the ordinary incidents of prison life." *Id.*, at 483–484 (citations and footnote omitted).

After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves "in relation to the ordinary incidents of prison life." *Id.*, at 484.

Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not "present a dramatic departure from the basic conditions of [the inmate's] sentence." *Id.*, at 485. We noted, for example, that inmates in the general population experienced "significant amounts of 'lockdown time' " and that the degree of confinement in disciplinary segregation was not excessive. *Id.*, at 486. We did not find, moreover, the short duration of segregation to work a major disruption in the inmate's environment. *Ibid.*

The *Sandin* standard requires us to determine if assignment to OSP "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.*, at 484. In *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. Compare, *e. g.*, *Beverati* v. *Smith*, 120 F. 3d 500, 504 (CA4 1997), and *Keenan* v. *Hall*, 83 F. 3d 1083, 1089 (CA9 1996), with *Hatch* v. *District of Columbia*, 184 F. 3d 846, 847 (CADC 1999). See also *Wagner* v. *Hanks*, 128 F. 3d 1173, 1177 (CA7 1997). This divergence indicates the difficulty of locating the appropriate baseline, an issue that was not explored at length in the briefs. We need not resolve the issue here, however, for we are satisfied that assignment to OSP imposes an atypical and significant hardship under any plausible baseline.

For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permit-

ted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. *Austin I*, 189 F. Supp. 2d, at 728. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP. *Sandin*, *supra*, at 483.

OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. See *infra*, at 227. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance.

IV

A liberty interest having been established, we turn to the question of what process is due an inmate whom Ohio seeks to place in OSP. Because the requirements of due process are "flexible and cal[l] for such procedural protections as the particular situation demands," *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972), we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures. The framework, established in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), requires consideration of three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous depriva-

> tion of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

The Court of Appeals upheld the District Court's procedural modifications under the assumption that *Sandin* altered the first *Mathews* factor. It reasoned that, "[i]n this first factor, *Sandin* affects the due process balance: because only those conditions that constitute 'atypical and significant hardships' give rise to liberty interests, those interests will necessarily be of a weight requiring greater due process protection." 372 F. 3d, at 358–359. This proposition does not follow from *Sandin*. *Sandin* concerned only whether a state-created liberty interest existed so as to trigger *Mathews* balancing at all. Having found no liberty interest to be at stake, *Sandin* had no occasion to consider whether the private interest was weighty vis-à-vis the remaining *Mathews* factors.

Applying the three factors set forth in *Mathews*, we find Ohio's New Policy provides a sufficient level of process. We first consider the significance of the inmate's interest in avoiding erroneous placement at OSP. Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all. See, *e. g.*, *Gerstein* v. *Pugh*, 420 U. S. 103 (1975); *Wolff*, 418 U. S. 539. The private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the context of the prison system and its attendant curtailment of liberties.

The second factor addresses the risk of an erroneous placement under the procedures in place, and the probable value, if any, of additional or alternative procedural safeguards. The New Policy provides that an inmate must receive notice

of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal. Our procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. See *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 15 (1979); *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 543 (1985); *Fuentes* v. *Shevin*, 407 U. S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified'" (quoting *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864))). Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason. In addition to having the opportunity to be heard at the Committee stage, Ohio also invites the inmate to submit objections prior to the final level of review. This second opportunity further reduces the possibility of an erroneous deprivation.

Although a subsequent reviewer may overturn an affirmative recommendation for OSP placement, the reverse is not true; if one reviewer declines to recommend OSP placement, the process terminates. This avoids one of the problems apparently present under the Old Policy, where, even if two levels of reviewers recommended against placement, a later reviewer could overturn their recommendation without explanation.

If the recommendation is OSP placement, Ohio requires that the decisionmaker provide a short statement of reasons. This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior. See *Greenholtz*, *supra*, at 16.

As we have noted, Ohio provides multiple levels of review for any decision recommending OSP placement, with power to overturn the recommendation at each level. In addition to these safeguards, Ohio further reduces the risk of erroneous placement by providing for a placement review within 30 days of an inmate's initial assignment to OSP.

The third *Mathews* factor addresses the State's interest. In the context of prison management, and in the specific circumstances of this case, this interest is a dominant consideration. Ohio has responsibility for imprisoning nearly 44,000 inmates. *Austin I*, 189 F. Supp. 2d, at 727. The State's first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves. See *Hewitt*, 459 U. S., at 473.

Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State's interest. Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls. See Brief for State of California et al. as *Amici Curiae* 6. Murder of an inmate, a guard, or one of their family members on the outside is a common form of gang discipline and control, as well as a condition for membership in some gangs. See, *e. g.*, *United States* v. *Santiago*, 46 F. 3d 885, 888 (CA9 1995); *United States* v. *Silverstein*, 732 F. 2d 1338, 1341 (CA7 1984). Testifying against, or otherwise informing on, gang activities can invite one's own death sentence. It is worth noting in this regard that for prison gang members serving life sentences, some without the possibility of parole, the deterrent effects of ordinary criminal punishment may be substantially diminished. See *id.*, at 1343 ("[T]o many inmates of Marion's Control Unit the price of murder must not be high and to some it must be close to zero").

The problem of scarce resources is another component of the State's interest. The cost of keeping a single prisoner in one of Ohio's ordinary maximum-security prisons is $34,167 per year, and the cost to maintain each inmate at OSP is $49,007 per year. See *Austin I*, *supra*, at 734, n. 17. We can assume that Ohio, or any other penal system, faced with costs like these will find it difficult to fund more effective education and vocational assistance programs to improve the lives of the prisoners. It follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.

The State's interest must be understood against this background. Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated. This problem, moreover, is not alleviated by providing an exemption for witnesses who pose a hazard, for nothing in the record indicates simple mechanisms exist to determine when witnesses may be called without fear of reprisal. The danger to witnesses, and the difficulty in obtaining their cooperation, make the probable value of an adversary-type hearing doubtful in comparison to its obvious costs.

A balance of the *Mathews* factors yields the conclusion that Ohio's New Policy is adequate to safeguard an inmate's liberty interest in not being assigned to OSP. Ohio is not, for example, attempting to remove an inmate from free society for a specific parole violation, see, *e. g.*, *Morrissey*, 408 U. S., at 481, or to revoke good-time credits for specific, serious misbehavior, see, *e. g.*, *Wolff*, 418 U. S., at 539, where more formal, adversary-type procedures might be useful. Where the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the

safety of other inmates and prison personnel, the informal, nonadversary procedures set forth in *Greenholtz*, 442 U. S. 1, and *Hewitt* v. *Helms*, *supra*, provide the appropriate model. *Greenholtz*, *supra*, at 16 (level of process due for inmates being considered for release on parole includes opportunity to be heard and notice of any adverse decision); *Hewitt*, *supra*, at 473–476 (level of process due for inmates being considered for transfer to administrative segregation includes some notice of charges and an opportunity to be heard). Although *Sandin* abrogated *Greenholtz*'s and *Hewitt*'s methodology for establishing the liberty interest, these cases remain instructive for their discussion of the appropriate level of procedural safeguards. Ohio's New Policy provides informal, nonadversary procedures comparable to those we upheld in *Greenholtz* and *Hewitt*, and no further procedural modifications are necessary in order to satisfy due process under the *Mathews* test. Neither the District Court nor the Court of Appeals should have ordered the New Policy altered.

The effect of the Prison Litigation Reform Act of 1995, in particular 18 U. S. C. § 3626(a)(1)(A), in this case has not been discussed at any length in the briefs. In view of our disposition it is unnecessary to address its application here.

Prolonged confinement in Supermax may be the State's only option for the control of some inmates, and claims alleging violation of the Eighth Amendment's prohibition of cruel and unusual punishments were resolved, or withdrawn, by settlement in an early phase of this case. Here, any claim of excessive punishment in individual circumstances is not before us.

The complaint challenged OSP assignments under the Old Policy, and the unwritten policies that preceded it, and alleged injuries resulting from those systems. Ohio conceded that assignments made under the Old Policy were, to say the least, imprecise. The District Court found constitutional violations had arisen under those earlier versions, and held

that the New Policy would produce many of the same constitutional problems. *Austin I*, 189 F. Supp. 2d, at 749–754. We now hold that the New Policy as described in this opinion strikes a constitutionally permissible balance between the factors of the *Mathews* framework. If an inmate were to demonstrate that the New Policy did not in practice operate in this fashion, resulting in a cognizable injury, that could be the subject of an appropriate future challenge. On remand, the Court of Appeals, or the District Court, may consider in the first instance what, if any, prospective relief is still a necessary and appropriate remedy for due process violations under Ohio's previous policies. Any such relief must, of course, satisfy the conditions set forth in 18 U. S. C. § 3626(a)(1)(A).

* * *

The Court of Appeals was correct to find the inmates possess a liberty interest in avoiding assignment at OSP. The Court of Appeals was incorrect, however, to sustain the procedural modifications ordered by the District Court. The portion of the Court of Appeals' opinion reversing the District Court's substantive modifications was not the subject of review upon certiorari and is unaltered by our decision.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

MILLER-EL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03–9659. Argued December 6, 2004—Decided June 13, 2005

When Dallas County prosecutors used peremptory strikes against 10 of the 11 qualified black venire members during jury selection for petitioner Miller-El's capital murder trial, he objected, claiming that the strikes were based on race and could not be presumed legitimate since the District Attorney's Office had a history of excluding blacks from criminal juries. The trial court denied his request for a new jury, and his trial ended with a death sentence. While his appeal was pending, this Court decided, in *Batson* v. *Kentucky*, 476 U. S. 79, that discrimination by a prosecutor in selecting a defendant's jury violated the Fourteenth Amendment. On remand, the trial court reviewed the *voir dire* record, heard prosecutor Macaluso's justifications for the strikes that were not explained during *voir dire*, and found no showing that prospective black jurors were struck because of their race. The State Court of Criminal Appeals affirmed. Subsequently, the Federal District Court denied Miller-El federal habeas relief, and the Fifth Circuit denied a certificate of appealability. This Court reversed, finding that the merits of Miller-El's *Batson* claim were, at least, debatable by jurists of reason. *Miller-El* v. *Cockrell*, 537 U. S. 322. The Fifth Circuit granted a certificate of appealability but rejected Miller-El's *Batson* claim on the merits.

Held: Miller-El is entitled to prevail on his *Batson* claim and, thus, entitled to habeas relief. Pp. 237–266.

(a) "[T]his Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia* v. *McCollum*, 505 U. S. 42, 44. The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature and subject to a myriad of legitimate influences. The *Batson* Court held that a defendant can make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial. 476 U. S., at 94. Once that showing is made, the burden shifts to the State to come forward with a neutral explanation, *id.*, at 97, and the trial court

must determine if the defendant has shown "purposeful discrimination," *id.*, at 98, in light of "all relevant circumstances," *id.*, at 96–97. Since this case is on review of a denial of habeas relief under 28 U. S. C. § 2254, and since the Texas trial court's prior determination that the State's race-neutral explanations were true is a factual determination, Miller-El may obtain relief only by showing the trial court's conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). Pp. 237–240.

(b) The prosecutors used peremptory strikes to exclude 91% of the eligible black venire panelists, a disparity unlikely to have been produced by happenstance. *Miller-El* v. *Cockrell*, 537 U. S., at 342. More powerful than the bare statistics are side-by-side comparisons of some black venire panelists who were struck and white ones who were not. If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination. The details of two panel member comparisons bear out this Court's observation, *id.*, at 343, that the prosecution's reason for exercising peremptory strikes against some black panel members appeared to apply equally to some white jurors. There are strong similarities and some differences between Billy Jean Fields, a black venireman who expressed unwavering support for the death penalty but was struck, and similarly situated nonblack jurors; but the differences seem far from significant, particularly when reading Fields's *voir dire* testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike, that Fields would not vote for death if rehabilitation were possible, a mischaracterization of his testimony, cannot reasonably be accepted when there were nonblack veniremen expressing comparable views on rehabilitation who were not struck. The prosecution's reason that Fields's brother had prior convictions is not creditable in light of its failure to enquire about the matter. The prosecution's proffered reasons for striking Joe Warren, another black venireman, are comparably unlikely. The fact that the reason for striking him, that he thought death was an easy way out and defendants should be made to suffer more, also applied to nonblack panel members who were selected is evidence of pretext. The suggestion of pretext is not, moreover, mitigated by Macaluso's explanation that Warren was struck when the State could afford to be liberal in using its 10 remaining peremptory challenges. Were that the explanation for striking Warren and later accepting similar panel members, prosecutors would have struck white panel member Jenkins, who was examined and accepted before Warren despite her similar views. Macaluso's explanation also weakens any suggestion that the State's ac-

ceptance of Woods, the one black juror, shows that race was not in play. When he was selected as the eighth juror, the State had used 11 of its 15 peremptory challenges, 7 on black panel members; and the record shows that at least 3 of the remaining venire panel opposed capital punishment. Because the prosecutors had to exercise prudent restraint, the late-stage decision to accept a black panel member willing to impose the death penalty does not neutralize the early-stage decision to challenge a comparable venireman, Warren. The Fifth Circuit's substituted reason for the elimination, Warren's general ambivalence about the penalty, was erroneous as a matter of fact and law. As to fact, Macaluso said nothing about general ambivalence, and Warren's answer to several questions was that he could impose the death penalty. As for law, the *Batson* rule provides the prosecutor an opportunity to give the reason for striking a juror and requires the judge to assess the reason's plausibility in light of all of the evidence, but it does not call for a mere exercise in thinking up any rational basis. Because a prosecutor is responsible for the reason he gave, the Fifth Circuit's substitution of a reason for excluding Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. Comparing Warren's strike with the treatment of panel members with similar views supports a conclusion that race was significant in determining who was challenged and who was not. Pp. 240–252.

(c) The prosecution's broader patterns of practice during jury selection also support the case for discrimination. Texas law permits either side to shuffle the cards bearing panel member names to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire*, for those not questioned by the end of each week are dismissed. Here, the prosecution shuffled the cards when a number of black members were seated at the front of the panel at the beginning of the second week. The third week, they shuffled when the first four members were black, placing them in the back. After the defense reshuffled the cards, and the black members reappeared in the front, the court denied the prosecution's request for another shuffle. No racially neutral reason for the shuffling has ever been offered, and nothing stops the suspicion of discriminatory intent from rising to an inference. The contrasting *voir dire* questions posed respectively to black and nonblack panel members also indicate that the State was trying to avoid black jurors. Prosecutors gave a bland description of the death penalty to 94% of white venire panel members before asking about the individual's feelings on the subject, but used a script describing imposition of the death penalty in graphic terms for 53% of the black venire members. The argument that prosecutors used the graphic script to weed out ambivalent panel members simply does not fit the facts. Black venire

members were more likely to receive that script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation failed for four out of the eight black panel members who received it: two received it after clearly stating their opposition to the death penalty and two received it even though they unambiguously favored that penalty. The State's explanation misses the mark four out of five times with regard to the nonblacks who received the graphic description. Ambivalent black panel members were also more likely to receive the graphic script than nonblack ambivalent ones. The State's attempt at a race-neutral rationalization fails to explain what the prosecutors did. The explanation that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to, or ambivalent about, the death penalty is more persuasive than the State's explanation, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script. The same is true for another kind of disparate questioning. The prosecutors asked all black panel members opposed to, or ambivalent about, the death penalty how low a sentence they would consider imposing for murder without telling them that the State requires a 5-year minimum, but prosecutors did not put that question to most white panel members who had expressed similar views. The final body of evidence confirming the conclusion here is that the Dallas County District Attorney's Office had, for decades, followed a specific policy of systematically excluding blacks from juries. The Miller-El prosecutors' notes of the race of each panel member show that they took direction from a jury selection manual that included racial stereotypes. Pp. 253–264.

(d) The Fifth Circuit's conclusion that Miller-El failed to show by clear and convincing evidence that the state court's no-discrimination finding was wrong is as unsupportable as the "dismissive and strained interpretation" of his evidence that this Court disapproved when deciding that he was entitled to a certificate of appealability, *Miller-El*, *supra*, at 344. Ten of the eleven black venire members were peremptorily struck. At least two of them were ostensibly acceptable to prosecutors seeking the death penalty. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion. The selection process was replete with evidence that prosecutors were selecting and rejecting potential jurors because of race. And the prosecutors took their cues from a manual on jury selection with an emphasis on race. It blinks reality to deny that the State struck Fields and Warren because they were black. The facts correlate to nothing as well as to race. The

state court's contrary conclusion was unreasonable as well as erroneous. Pp. 265–266.

361 F. 3d 849, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 266. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 274.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Jim Marcus* and *David W. Ogden*.

Gena Bunn, Assistant Attorney General of Texas, argued the cause for respondent. With her on the brief were *Greg Abbott*, Attorney General, *Barry R. McBee*, First Assistant Attorney General, and *Don Clemmer*, Deputy Attorney General.*

JUSTICE SOUTER delivered the opinion of the Court.

Two years ago, we ordered that a certificate of appealability, under 28 U. S. C. § 2253(c), be issued to habeas petitioner Miller-El, affording review of the District Court's rejection of the claim that prosecutors in his capital murder trial made peremptory strikes of potential jurors based on race. Today we find Miller-El entitled to prevail on that claim and order relief under § 2254.

I

In the course of robbing a Holiday Inn in Dallas, Texas, in late 1985, Miller-El and his accomplices bound and gagged

*Briefs of *amici curiae* urging reversal were filed for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Theodore M. Shaw*, *Norman J. Chachkin*, *Deborah Fins*, *Miriam Gohara*, and *Christina Swarns*; and for Former Prosecutors and Judges by *Elisabeth Semel*, *Charles D. Weisselberg*, *Carter G. Phillips*, *Jeffrey T. Green*, and *Scott D. Marcus*.

A brief of *amicus curiae* was filed for the State of California by *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Gary W. Schons*, Senior Assistant Attorney General, *Steven T. Oetting*, Supervising Deputy Attorney General, and *Sabrina Y. Lane-Erwin*, Deputy Attorney General.

two hotel employees, whom Miller-El then shot, killing one and severely injuring the other. During jury selection in Miller-El's trial for capital murder, prosecutors used peremptory strikes against 10 qualified black venire members. Miller-El objected that the strikes were based on race and could not be presumed legitimate, given a history of excluding black members from criminal juries by the Dallas County District Attorney's Office. The trial court received evidence of the practice alleged but found no "systematic exclusion of blacks as a matter of policy" by that office, App. 882–883, and therefore no entitlement to relief under *Swain* v. *Alabama*, 380 U. S. 202 (1965), the case then defining and marking the limits of relief from racially biased jury selection. The court denied Miller-El's request to pick a new jury, and the trial ended with his death sentence for capital murder.

While an appeal was pending, this Court decided *Batson* v. *Kentucky*, 476 U. S. 79 (1986), which replaced *Swain*'s threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation. The Texas Court of Criminal Appeals then remanded the matter to the trial court to determine whether Miller-El could show that prosecutors in his case peremptorily struck prospective black jurors because of race. *Miller-El* v. *State*, 748 S. W. 2d 459 (1988) (en banc).

The trial court found no such demonstration. After reviewing the *voir dire* record of the explanations given for some of the challenged strikes, and after hearing one of the prosecutors, Paul Macaluso, give his justification for those previously unexplained, the trial court accepted the stated race-neutral reasons for the strikes, which the judge called "completely credible [and] sufficient" as the grounds for a finding of "no purposeful discrimination." Findings of Fact and Conclusions of Law Upon Remand from the Court of Criminal Appeals in *State* v. *Miller-El*, No. 8668–NL (5th Crim. Dist. Ct., Dallas County, Tex., Jan. 13, 1989), pp. 5–6,

App. 928–929. The Court of Criminal Appeals affirmed, stating it found "ample support" in the *voir dire* record for the race-neutral explanations offered by prosecutors for the peremptory strikes. *Miller-El* v. *State*, No. 69,677 (Sept. 16, 1992) *(per curiam)*, p. 2, App. 931.

Miller-El then sought habeas relief under 28 U. S. C. § 2254, again pressing his *Batson* claim, among others not now before us. The District Court denied relief, *Miller-El* v. *Johnson*, Civil No. 3:96–CV–1992–H (ND Tex., June 5, 2000), App. 987, and the Court of Appeals for the Fifth Circuit precluded appeal by denying a certificate of appealability, *Miller-El* v. *Johnson*, 261 F. 3d 445 (2001). We granted certiorari to consider whether Miller-El was entitled to review on the *Batson* claim, *Miller-El* v. *Cockrell*, 534 U. S. 1122 (2002), and reversed the Court of Appeals. After examining the record of Miller-El's extensive evidence of purposeful discrimination by the Dallas County District Attorney's Office before and during his trial, we found an appeal was in order, since the merits of the *Batson* claim were, at the least, debatable by jurists of reason. *Miller-El* v. *Cockrell*, 537 U. S. 322 (2003). After granting a certificate of appealability, the Fifth Circuit rejected Miller-El's *Batson* claim on the merits. 361 F. 3d 849 (2004). We again granted certiorari, 542 U. S. 936 (2004), and again we reverse.

II

A

"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (1880); see also *Batson* v. *Kentucky*, *supra*, at 86. Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, *Strauder* v. *West Virginia*, *supra*, at 308, but racial minorities are harmed more generally, for prosecu-

tors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 128 (1994).

Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . ." *Powers* v. *Ohio*, 499 U. S. 400, 412 (1991). That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," *ibid.*, and undermines public confidence in adjudication, *Georgia* v. *McCollum*, 505 U. S. 42, 49 (1992); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 628 (1991); *Batson* v. *Kentucky*, *supra*, at 87. So, "[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia* v. *McCollum*, *supra*, at 44; see *Strauder* v. *West Virginia*, *supra*, at 308, 310; *Norris* v. *Alabama*, 294 U. S. 587, 596 (1935); *Swain* v. *Alabama*, *supra*, at 223–224; *Batson* v. *Kentucky*, *supra*, at 84; *Powers* v. *Ohio*, *supra*, at 404.

The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected. In *Swain* v. *Alabama*, we tackled the problem of "the quantum of proof necessary" to show purposeful discrimination, 380 U. S., at 205, with an eye to preserving each side's historical prerogative to make a peremptory strike or challenge, the very nature of which is traditionally "without a reason stated," *id.*, at 220. The *Swain* Court tried to relate peremptory challenge to equal protection by presuming the legitimacy of prosecutors' strikes except in the face of a longstanding pattern of discrimination: when "in case after case, whatever the circumstances," no blacks served on ju-

ries, then "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge [were] being perverted." *Id.*, at 223–224.

Swain's demand to make out a continuity of discrimination over time, however, turned out to be difficult to the point of unworkable, and in *Batson* v. *Kentucky*, we recognized that this requirement to show an extended pattern imposed a "crippling burden of proof" that left prosecutors' use of peremptories "largely immune from constitutional scrutiny." 476 U. S., at 92–93. By *Batson*'s day, the law implementing equal protection elsewhere had evolved into less discouraging standards for assessing a claim of purposeful discrimination, *id.*, at 93–95 (citing, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977)), and we accordingly held that a defendant could make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial. *Batson* v. *Kentucky*, 476 U. S., at 94, 96. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors" within an arguably targeted class. *Id.*, at 97. Although there may be "any number of bases on which a prosecutor reasonably [might] believe that it is desirable to strike a juror who is not excusable for cause . . . , the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e]." *Id.*, at 98, n. 20 (internal quotation marks omitted). "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.*, at 98.

Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness

of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. 476 U. S., at 96–97.

B

This case comes to us on review of a denial of habeas relief sought under 28 U. S. C. § 2254, following the Texas trial court's prior determination of fact that the State's race-neutral explanations were true, see *Purkett* v. *Elem*, 514 U. S. 765, 769 (1995) *(per curiam); Batson* v. *Kentucky*, *supra*, at 98, n. 21.

Under the Antiterrorism and Effective Death Penalty Act of 1996, Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the "presumption of correctness by clear and convincing evidence." § 2254(e)(1). The standard is demanding but not insatiable; as we said the last time this case was here, "[d]eference does not by definition preclude relief." *Miller-El* v. *Cockrell*, 537 U. S., at 340.

III

A

The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were

peremptorily struck by the prosecution. *Id.*, at 331. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity." *Id.*, at 342.

More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step. Cf. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 147 (2000) (in employment discrimination cases, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive"). While we did not develop a comparative juror analysis last time, we did note that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served. *Miller-El* v. *Cockrell*, *supra*, at 343.[1] The details of two panel member comparisons bear this out.[2]

---

[1] While many of these explanations were offered contemporaneously, "the state trial court had no occasion to judge the credibility of these explanations at that time because our equal protection jurisprudence then, dictated by *Swain*, did not require it." *Miller-El* v. *Cockrell*, 537 U. S., at 343. Other evidence was presented in the *Batson* v. *Kentucky*, 476 U. S. 79 (1986), hearing, but this was offered two years after trial and "was subject to the usual risks of imprecision and distortion from the passage of time." 537 U. S., at 343.

[2] The dissent contends that comparisons of black and nonblack venire panelists, along with Miller-El's arguments about the prosecution's disparate questioning of black and nonblack panelists and its use of jury shuffles, are not properly before this Court, not having been "put before the Texas courts." *Post*, at 279 (opinion of THOMAS, J.). But the dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence. See 28 U. S. C. §2254(d)(2) (state-court factfinding

The prosecution used its second peremptory strike to exclude Billy Jean Fields, a black man who expressed unwavering support for the death penalty. On the questionnaire filled out by all panel members before individual examination on the stand, Fields said that he believed in capital punishment, Joint Lodging 14, and during questioning he disclosed his belief that the State acts on God's behalf when it imposes the death penalty. "Therefore, if the State exacts death, then that's what it should be." App. 174. He testified that he had no religious or philosophical reservations about the death penalty and that the death penalty deterred crime. *Id.*, at 174–175. He twice averred, without apparent hesitation, that he could sit on Miller-El's jury and make a decision to impose this penalty. *Id.*, at 176–177.

Although at one point in the questioning, Fields indicated that the possibility of rehabilitation might be relevant to the likelihood that a defendant would commit future acts of violence, *id.*, at 183, he responded to ensuing questions by saying that although he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty:

> "[B]ased on what you [the prosecutor] said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment

---

must be assessed "in light of the evidence presented in the State court proceeding"); *Miller-El* v. *Cockrell*, *supra*, at 348 (habeas petitioner must show unreasonability "in light of the record before the [state] court"). There can be no question that the transcript of *voir dire*, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts, nor does the dissent contend that Miller-El did not "fairly presen[t]" his *Batson* claim to the state courts. *Picard* v. *Connor*, 404 U. S. 270, 275 (1971).

Only as to the juror questionnaires and information cards is there question about what was before the state courts. Unlike the dissent, see *post*, at 281–282, we reach no decision about whether the limitation on evidence in § 2254(d)(2) is waiveable. See *infra*, at 256–257, n. 15.

would give an individual an opportunity to rehabilitate. But, you know, you said that the jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down." *Id.*, at 185 (alteration omitted).

Fields also noted on his questionnaire that his brother had a criminal history. Joint Lodging 13. During questioning, the prosecution went into this, too:

"Q Could you tell me a little bit about that?

"A He was arrested and convicted on [a] number of occasions for possession of a controlled substance.

"Q Was that here in Dallas?

"A Yes.

"Q Was he involved in any trials or anything like that?

"A I suppose of sorts. I don't really know too much about it.

"Q Was he ever convicted?

"A Yeah, he served time.

"Q Do you feel that that would in any way interfere with your service on this jury at all?

"A No." App. 190 (alteration omitted).

Fields was struck peremptorily by the prosecution, with prosecutor James Nelson offering a race-neutral reason:

"[W]e . . . have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." *Id.*, at 197 (alteration omitted).

Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.

If, indeed, Fields's thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations. Sandra Hearn said that she believed in the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." *Id.*, at 429.[3] Hearn went so far as to express doubt that at the penalty phase of a capital case she could conclude that a convicted murderer "would probably commit some criminal acts of violence in the future." *Id.*, at 440. "People change," she said, making it hard to assess the risk of someone's future dangerousness. "[T]he evidence would have to be awful strong." *Ibid.* But the prosecution did not respond to Hearn the way it did to Fields, and without delving into her views about rehabilitation with any further question, it raised no objection to her serving on the jury. White panelist Mary Witt said she would take the possibility of rehabilitation into account in deciding at the penalty phase of the trial about a defendant's probability of future dangerousness, 6 Record of *Voir Dire* 2433 (hereinafter Record), but the prosecutors asked her no further question about her views on reformation, and they

[3] Hearn could give the death penalty for murder if the defendant had committed a prior offense of robbery, in which case she would judge "according to the situation," App. 430, and she thought the death penalty might be appropriate for offenses like "[e]xtreme child abuse," *ibid.*

accepted her as a juror, *id.*, at 2464–2465.[4] Latino venireman Fernando Gutierrez, who served on the jury, said that he would consider the death penalty for someone who could not be rehabilitated, App. 777, but the prosecutors did not question him further about this view. In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.[5]

The unlikelihood that his position on rehabilitation had anything to do with the peremptory strike of Fields is underscored by the prosecution's response after Miller-El's lawyer pointed out that the prosecutor had misrepresented Fields's responses on the subject. A moment earlier the prosecutor

---

[4] Witt ultimately did not serve because she was peremptorily struck by the defense. 6 Record 2465. The fact that Witt and other venire members discussed here were peremptorily struck by the defense is not relevant to our point. For each of them, the defense did not make a decision to exercise a peremptory until after the prosecution decided whether to accept or reject, so each was accepted by the prosecution before being ultimately struck by the defense. And the underlying question is not what the defense thought about these jurors but whether the State was concerned about views on rehabilitation when the venireperson was not black.

The dissent offers other reasons why these nonblack panel members who expressed views on rehabilitation similar to Fields's were otherwise more acceptable to the prosecution than he was. See *post*, at 293–296. In doing so, the dissent focuses on reasons the prosecution itself did not offer. See *infra*, at 252.

[5] Prosecutors did exercise peremptory strikes on Penny Crowson and Charlotte Whaley, who expressed views about rehabilitation similar to those of Witt and Gutierrez. App. 554, 715.

had finished his misdescription of Fields's views on potential rehabilitation with the words, "Those are our reasons for exercising our . . . strike at this time." *Id.*, at 197. When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike. *Id.*, at 198. Instead, he suddenly came up with Fields's brother's prior conviction as another reason for the strike. *Id.*, at 199.

It would be difficult to credit the State's new explanation, which reeks of afterthought. While the Court of Appeals tried to bolster it with the observation that no seated juror was in Fields's position with respect to his brother, 361 F. 3d, at 859–860, the court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible. Fields's testimony indicated he was not close to his brother, App. 190 ("I don't really know too much about it"), and the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered. See, *e. g.*, *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"). There is no good reason to doubt that the State's afterthought about Fields's brother was anything but makeweight.

The Court of Appeals's judgment on the Fields strike is unsupportable for the same reason the State's first explanation is itself unsupportable. The Appeals Court's description of Fields's *voir dire* testimony mentioned only his statements that everyone could be rehabilitated, failing to note that Fields affirmed that he could give the death penalty if the law and evidence called for it, regardless of the possibility of divine grace. The Court of Appeals made no mention of the fact that the prosecution mischaracterized Fields as

saying he could not give death if rehabilitation were possible. 361 F. 3d, at 856.

In sum, when we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences.[6] But the differences seem far from significant, particularly when we read Fields's *voir dire* testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted. See *Miller-El* v. *Cockrell*, 537 U. S., at 339 (the credibility of reasons given can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy").

The prosecution's proffered reasons for striking Joe Warren, another black venireman, are comparably unlikely. Warren gave this answer when he was asked what the death penalty accomplished:

> "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're

[6] The dissent contends that there are no white panelists similarly situated to Fields and to panel member Joe Warren because "'"[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them.'" *Post*, at 291 (quoting *Miller-El* v. *Cockrell*, 537 U. S., at 362–363 (THOMAS, J., dissenting)). None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

> relieving personal punishment." App. 205; 3 Record 1532.

The prosecution said nothing about these remarks when it struck Warren from the panel, but prosecutor Paul Macaluso referred to this answer as the first of his reasons when he testified at the later *Batson* hearing:

> "I thought [Warren's statements on *voir dire*] were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more." App. 909.

On the face of it, the explanation is reasonable from the State's point of view, but its plausibility is severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's. Kevin Duke, who served on the jury, said, "sometimes death would be better to me than—being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I['d] just as soon have it over with than be in prison for the rest of your life." *Id.*, at 372. Troy Woods, the one black panelist to serve as juror, said that capital punishment "is too easy. I think that's a quick relief. . . . I feel like [hard labor is] more of a punishment than putting them to sleep." *Id.*, at 408. Sandra Jenkins, whom the State accepted (but who was then struck by the defense) testified that she thought "a harsher treatment is life imprisonment with no parole." *Id.*, at 542. Leta Girard, accepted by the State (but also struck by the defense) gave her opinion that "living sometimes is a worse—is worse to me than dying would be." *Id.*, at 624. The fact that Macaluso's reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.

The suggestion of pretext is not, moreover, mitigated much by Macaluso's explanation that Warren was struck when the State had 10 peremptory challenges left and could afford to be liberal in using them. *Id.*, at 908. If that were the explanation for striking Warren and later accepting panel members who thought death would be too easy, the prosecutors should have struck Sandra Jenkins, whom they examined and accepted before Warren. Indeed, the disparate treatment is the more remarkable for the fact that the prosecutors repeatedly questioned Warren on his capacity and willingness to impose a sentence of death and elicited statements of his ability to do so if the evidence supported that result and the answer to each special question was yes, *id.*, at 202.2, 202.3, 205, 207, whereas the record before us discloses no attempt to determine whether Jenkins would be able to vote for death in spite of her view that it was easy on the convict, *id.*, at 541–546. Yet the prosecutors accepted the white panel member Jenkins and struck the black venireman Warren.

Macaluso's explanation that the prosecutors grew more sparing with peremptory challenges as the jury selection wore on does, however, weaken any suggestion that the State's acceptance of Woods, the one black juror, shows that race was not in play. Woods was the eighth juror, qualified in the fifth week of jury selection. Joint Lodging 125. When the State accepted him, 11 of its 15 peremptory strikes were gone, 7 of them used to strike black panel members. *Id.*, at 137. The juror questionnaires show that at least three members of the venire panel yet to be questioned on the stand were opposed to capital punishment, Janice Mackey, *id.*, at 79; Paul Bailey, *id.*, at 63; and Anna Keaton, *id.*, at 55.[7] With at least three remaining panel members

[7] Each of them was black and each was peremptorily struck by the State after Woods's acceptance. It is unclear whether the prosecutors knew they were black prior to the *voir dire* questioning on the stand, though

highly undesirable to the State, the prosecutors had to exercise prudent restraint in using strikes. This late-stage decision to accept a black panel member willing to impose a death sentence does not, therefore, neutralize the early-stage decision to challenge a comparable venireman, Warren. In fact, if the prosecutors were going to accept any black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so was getting late.[8]

The Court of Appeals pretermitted these difficulties by stating that the prosecution's reason for striking Warren was a more general ambivalence about the penalty and his ability to impose it, 361 F. 3d, at 856–857 (and the dissent presses that explanation here, *post*, at 286–289). But this rationalization was erroneous as a matter of fact and as a matter of law.

As to fact, Macaluso said nothing about any general ambivalence. He simply alluded to the possibility that Warren might think the death penalty too easy on some defendants, saying nothing about Warren's ability to impose the penalty when it appeared to be warranted.[9] On the contrary, though

---

there is some indication that they did: prosecutors noted the race of each panelist on all of the juror cards, *Miller-El* v. *Cockrell*, 537 U. S., at 347, even for those panelists who were never questioned individually because the week ended before it was their turn.

[8] Nor is pretextual indication mitigated by Macaluso's further reason that Warren had a brother-in-law convicted of a crime having to do with food stamps for which he had to make restitution. App. 910. Macaluso never questioned Warren about his errant relative at all; as with Fields's brother, the failure to ask undermines the persuasiveness of the claimed concern. And Warren's brother's criminal history was comparable to those of relatives of other panel members not struck by prosecutors. Cheryl Davis's husband had been convicted of theft and received seven years' probation. *Id.*, at 695–696. Chatta Nix's brother was involved in white-collar fraud. *Id.*, at 613–614. Noad Vickery's sister served time in a penitentiary several decades ago. *Id.*, at 240–241.

[9] But even if Macaluso actually had explained that he exercised the strike because Warren was diffident about imposing death, it would have been hard to square that explanation with the prosecution's tolerance for

Warren had indeed questioned the extent to which the death penalty served a purpose in society, App. 205, he explained his position in response to the very next question: it was not any qualm about imposing what society generally deems its harshest punishment, but his concern that the death penalty might not be severe enough, *ibid.* When Warren was asked whether he could impose the death penalty he said he thought he could; when told that answering yes to the special issue questions would be tantamount to voting for death he said he could give yes answers if the evidence supported them. *Id.*, at 207.[10]

As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and

---

a number of ambivalent white panel members. Juror Marie Mazza, for example, admitted some concern about what her associates might think of her if she sat on a jury that called for the death penalty. *Id.*, at 354–355. Ronald Salsini, accepted by the prosecution but then struck by the defense, worried that if he gave the death penalty he might have a "problem" in the future with having done so. *Id.*, at 593. Witt, another panel member accepted by the State but struck by the defense, said she did not know if she could give that sentence. 6 Record 2423.

[10] The Court of Appeals also found ambivalence in Warren's statement, when asked how he felt generally about the death penalty, that, "there are some cases where I would agree, you know, and there are others that I don't." App. 202.2 (quoted in 361 F. 3d 849, 857 (CA5 2004)). But a look at Warren's next answers shows what he meant. The sorts of cases where he would impose it were those where "maybe things happen that could have been avoided," such as where there is a choice not to kill, but he would not impose it for killing "in self[-]defense sometimes." App. 202.2–202.3. Where the death penalty is sought for murder committed at the same time as another felony, Warren thought that it "depends on the case and the circumstances involved at the time." *Id.*, at 204. None of these responses is exceptionable. A number of venire members not struck by the State, including some seated on the jury, offered some version of the uncontroversial, and responsible, view that imposition of the death penalty ought to depend on the circumstances. See Joint Lodging 176 (Marie Mazza, a seated juror); *id.*, at 223 (Filemon Zablan, a seated juror); App. 548 (Colleen Moses, struck by the defense); *id.*, at 618 (Mary Witt, struck by the defense); 11–(B) Record 4455–4456 (Max O'Dell, struck by the defense).

it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. 476 U. S., at 96–97; *Miller-El* v. *Cockrell*, 537 U. S., at 339. It is true that peremptories are often the subjects of instinct, *Batson* v. *Kentucky*, *supra*, at 106 (Marshall, J., concurring), and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.[11]

---

[11] There were other black members of the venire struck purportedly because of some ambivalence, about the death penalty or their capacity to impose it, who Miller-El argues must actually have been struck because of race, none of them having expressed any more ambivalence than white jurors Mazza and Hearn. We think these are closer calls, however. Edwin Rand said at points that he could impose the death penalty, but he also said "right now I say I can, but tomorrow I might not." App. 265 (alteration omitted). Wayman Kennedy testified that he could impose the death penalty, but on his questionnaire and *voir dire*, he was more specific, saying that he believed in the death penalty for mass murder. *Id.*, at 317; Joint Lodging 46. (Arguably Fernando Gutierrez, accepted by the prosecution, expressed a similar view when he offered as an example of a defendant who merited the death penalty a "criminally insane" person who could not be rehabilitated. App. 777. But perhaps prosecutors took

B

The case for discrimination goes beyond these comparisons to include broader patterns of practice during the jury selection. The prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race. Finally, the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected.

The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle. In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning.[12] Once the order is established, the panel members seated at the back are likely to escape *voir dire* altogether, for those not questioned by the end of the week are dismissed. As we previously explained,

---

Gutierrez to mean this only as an example.) Roderick Bozeman stated that he thought he could vote for the death penalty but he didn't really know. *Id.*, at 145. Finally, Carrol Boggess expressed uncertainty whether she could go through with giving the death penalty, *id.*, at 298–299, although she later averred that she could, *id.*, at 302–304.

We do not decide whether there were white jurors who expressed ambivalence just as much as these black members of the venire panel. There is no need to go into these instances, for the prosecutors' treatment of Fields and Warren supports stronger arguments that *Batson* was violated.

[12] The procedure is conducted under Tex. Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp. 2004–2005). While that statute says that the court clerk is to conduct a shuffle on the request of either party, the transcripts in this case make clear that each side did its own shuffles. See, *e. g.*, App. 124.

> "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past." *Miller-El* v. *Cockrell*, *supra*, at 346.

In this case, the prosecution and then the defense shuffled the cards at the beginning of the first week of *voir dire;* the record does not reflect the changes in order. App. 113–114. At the beginning of the second week, when a number of black members were seated at the front of the panel, the prosecution shuffled.[13] 2 Record 836–837. At the beginning of the third week, the first four panel members were black. The prosecution shuffled, and these black panel members ended up at the back. Then the defense shuffled, and the black panel members again appeared at the front. The prosecution requested another shuffle, but the trial court refused. App. 124–132. Finally, the defense shuffled at the beginning of the fourth and fifth weeks of *voir dire;* the record does not reflect the panel's racial composition before or after those shuffles. *Id.*, at 621–622; 9 Record 3585–3586.

The State notes in its brief that there might be racially neutral reasons for shuffling the jury, Brief for Respondent 36–37, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing

---

[13] Of the first 10 panel members before the prosecution shuffled, 4 were black. Of the second 10, 3 were black. Of the third 10, 2 were black, and only 1 black was among the last 10 panel members. 2 Record 837.

stops the suspicion of discriminatory intent from rising to an inference.[14]

The next body of evidence that the State was trying to avoid black jurors is the contrasting *voir dire* questions posed respectively to black and nonblack panel members, on two different subjects. First, there were the prosecutors' statements preceding questions about a potential juror's thoughts on capital punishment. Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail. It is intended, Miller-El contends, to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause. If the graphic script is given to a higher proportion of blacks than whites, this is evidence that prosecutors more often wanted blacks off the jury, absent some neutral and extenuating explanation.

As we pointed out last time, for 94% of white venire panel members, prosecutors gave a bland description of the death penalty before asking about the individual's feelings on the subject. *Miller-El* v. *Cockrell*, 537 U. S., at 332. The abstract account went something like this:

> "I feel like it [is] only fair that we tell you our position in this case. The State of Texas . . . is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity and type of evi-

---

[14] The Court of Appeals declined to give much weight to the evidence of racially motivated jury shuffles because "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." 361 F. 3d, at 855. But Miller-El's shuffles are flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks. (The Appeals Court's statement was also inaccurate: the prosecution shuffled the jury three times.)

> dence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic death penalty from Judge McDowell." App. 564–565.

Only 6% of white venire panelists, but 53% of those who were black, heard a different description of the death penalty before being asked their feelings about it. This is an example of the graphic script:

> "I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El. . . .
>
> "We do that with the anticipation that, when the death penalty is assessed, at some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically our position going into this thing." *Id.*, at 572–573 (alteration omitted).

The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire.[15] Prosecu-

---

[15] So far as we can tell from the voluminous record before us, many of the juror questionnaires, along with juror information cards, were added to the habeas record after the filing of the petition in the District Court. See Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence, Record in No. 00–10784 (CA5), p. 2494. The State raised no objection to receipt of the supplemental material in the District Court or the Fifth Circuit, and in this Court the State has joined with Miller-El in proposing that we consider this material, by providing addi-

tors were trying, the argument goes, to weed out noncommittal or uncertain jurors, not black jurors. And while some white venire members expressed opposition to the death penalty on their questionnaires, they were not read the graphic script because their feelings were already clear. The State says that giving the graphic script to these panel members would only have antagonized them. Brief for Respondent 27–32.

This argument, however, first advanced in dissent when the case was last here, *Miller-El* v. *Cockrell*, *supra*, at 364–368 (opinion of THOMAS, J.), and later adopted by the State and the Court of Appeals, simply does not fit the facts. Looking at the answers on the questionnaires, and at *voir dire* testimony expressly discussing answers on the question-

---

tional copies in a joint lodging (apparently as an alternative to a more costly printing as part of the joint appendix). Neither party has referred to the provision that the reasonableness of the state-court determination be judged by the evidence before the state court, 28 U. S. C. § 2254(d)(2), and it is not clear to what extent the lodged material expands upon what the state judge knew; the same judge presided over the *voir dire*, the *Swain* hearing, and the *Batson* hearing, and the jury questionnaires were subjects of reference at the *voir dire*. The last time this case was here the State expressly relied on the questionnaires for one of its arguments, Brief for Respondent in *Miller-El* v. *Cockrell*, O. T. 2002, No. 01–7662, p. 17, and although it objected to the Court's consideration of some other evidence not before the state courts, *id.*, at 28–29, it did not object either to questionnaires or juror cards. This time around, the State again relies on the jury questionnaires for its argument that the prosecution's disparate questioning was not based on race. We have no occasion here to reach any question about waiver under § 2254(d)(2).

It is worth noting that if we excluded the lodged material in this case, the State's arguments would fare even worse than they do. The panel members' cards and answers to the questionnaires were the only items of information that the prosecutors had about them, other than their appearances, before reaching the point of choosing whether to employ the graphic script; if we excluded consideration of the questionnaires, the State would be left with no basis even to argue extenuation of the extreme racial disparity in the use of the graphic script.

naires,[16] we find that black venire members were more likely than nonblacks to receive the graphic script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation for the graphic script fails in the cases of four out of the eight black panel members who received it.[17] Two of them, Janice Mackey and Anna Keaton, clearly stated opposition to the death penalty but they received the graphic script,[18] while the black panel members Wayman Kennedy and Jeannette Butler were unambiguously in favor[19] but got the graphic

---

[16] We confine our analysis to these sources because the questionnaires and any testimony about their answers provided the only information available to prosecutors about venire members' views on the death penalty before they decided whether to use the graphic script.

[17] The dissent has conducted a similar statistical analysis that it contends supports the State's argument that the graphic script was used to expose the true feelings of jurors who professed ambivalence about the death penalty on their questionnaires. See *post*, at 296–302. A few examples suffice to show that the dissent's conclusions rest on characterizations of panel members' questionnaire responses that we consider implausible. In the dissent's analysis, for example, Keaton and Mackey were ambivalent, despite Keaton's questionnaire response that she did not believe in the death penalty and felt it was not for her to punish anyone, Joint Lodging 55, and Mackey's response that "[t]hou shall [n]ot kill," *id.*, at 79. But we believe neither can be fairly characterized as someone who might turn out to be a juror acceptable to the State upon pointed questioning. The dissent also characterizes the questionnaires of Vivian Sztybel, Filemon Zablan, and Dominick Desinise as revealing ambivalence. But Sztybel's questionnaire stated that she believed in the death penalty "[i]f a person is found guilty of murder or other crime . . . without a valid defense" because "[t]hey may continue to do this again and again." *Id.*, at 184. She also reported that she had no moral, religious, or personal belief that would prevent her from imposing the death penalty. *Ibid.* Zablan stated on the questionnaire that he was able to impose the death penalty and that he supported it "[i]f it's the law and if the crime fits such punishment." *Id.*, at 223. Desinise reported in *voir dire* that he had stated in the questionnaire his opposition to the death penalty. App. 573.

[18] *Id.*, at 728 (Mackey); *id.*, at 769 (Keaton).

[19] Kennedy said that he believed in the death penalty but would apply it only in an extreme case such as one involving multiple murders. Joint Lodging 46. There is no ambivalence in his questionnaire re-

description anyway.[20] The State's explanation does even worse in the instances of the five nonblacks who received the graphic script, missing the mark four times out of five: Vivian Sztybel and Filemon Zablan received it,[21] although each was unambiguously in favor of the death penalty,[22] while Dominick Desinise and Clara Evans unambiguously opposed it[23] but were given the graphic version.[24]

The State's purported rationale fails again if we look only to the treatment of ambivalent panel members, ambivalent black individuals having been more likely to receive the graphic description than ambivalent nonblacks. Three nonblack members of the venire indicated ambivalence to the death penalty on their questionnaires;[25] only one of them,

---

sponses. Butler's questionnaire is not available, but she affirmed in *voir dire* that she had said on her questionnaire that she believed in the death penalty, that she had no moral, religious, or personal beliefs that would prevent her from imposing the death penalty, and that she had reported on her questionnaire that she "believe[d] in the death penalty only when a crime has been committed concerning a child such as beating to death or some form of harsh physical abuse and when an innocent victim's life is taken." 4 Record 1874 (internal quotation marks omitted); see also *id.*, at 1906–1907.

[20] App. 579 (Butler); *id.*, at 317 (Kennedy).

[21] *Id.*, at 640–641 (Sztybel); *id.*, at 748 (Zablan).

[22] Joint Lodging 184 (Sztybel); *id.*, at 223 (Zablan).

[23] Neither questionnaire is available, but Desinise and Evans both confirmed on *voir dire* that on the questionnaire they stated their opposition to the death penalty. App. 573 (Desinise); *id.*, at 626–628 (Evans).

[24] *Id.*, at 573 (Desinise); *id.*, at 626 (Evans).

[25] In answering the question whether she had moral, religious, or personal beliefs that might prevent her from giving the death penalty, Colleen Moses confirmed at *voir dire* that she said, "I don't know. It would depend." 3 Record 1141 (internal quotation marks omitted). Noad Vickery confirmed at *voir dire* that he reported on the questionnaire that he was not sure what he believed about the death penalty. 4 *id.*, at 1611. Fernando Gutierrez reported on the questionnaire that he believed in the death penalty for some crimes but answered "yes" to the question whether he had moral, religious, or personal beliefs that might prevent him from imposing it. Joint Lodging 231.

Fernando Gutierrez, received the graphic script.[26] But of the four black panel members who expressed ambivalence,[27] all got the graphic treatment.[28]

The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation.[29] Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition,[30] only 30% received the graphic treatment.[31] But of the seven blacks who expressed ambivalence or opposition,[32] 86% heard the graphic script.[33] As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.

---

[26] App. 775 (Gutierrez); *id.*, at 547 (Moses); 4 Record 1569 (Vickery).

[27] These were Linda Baker, Joint Lodging 71; Paul Bailey, *id.*, at 63; Carrol Boggess, *id.*, at 38; and Troy Woods, *id.*, at 207.

[28] App. 294 (Boggess); *id.*, at 652–653 (Baker); *id.*, at 405–406 (Woods); *id.*, at 737 (Bailey).

[29] The dissent posits that prosecutors did not use the graphic script with panel members opposed to the death penalty because it would only have antagonized them. See *post*, at 301. No answer is offered to the question why a prosecutor would take care with the feelings of a panel member he would excuse for cause or strike yet would antagonize an ambivalent member whose feelings he wanted to smoke out, but who might turn out to be an acceptable juror.

[30] These were John Nelson, 2 Record 625; James Holtz, *id.*, at 1022; Moses, 3 *id.*, at 1141; Linda Berk, *id.*, at 1445, 1450; Desinise, App. 573; Vickery, 4 Record 1610; Gene Hinson, App. 576; Girard, *id.*, at 624; Evans, *id.*, at 627–628; Gutierrez, Joint Lodging 231.

[31] These were Desinise, App. 573; Evans, *id.*, at 626; and Gutierrez, *id.*, at 775.

[32] These were Jerry Mosley, 7 Record 2658; Baker, Joint Lodging 71; Bailey, *id.*, at 63; Keaton, *id.*, at 55; Mackey, *id.*, at 79; Boggess, *id.*, at 38; and Woods, *id.*, at 207.

[33] Only Mosley did not. App. 630.

The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike. Two Terms ago, we described how this disparate questioning was correlated with race:

> "Ninety-four percent of whites were informed of the statutory minimum sentence, compared [with] only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity. *Pierre* v. *Louisiana*, 306 U. S. 354, 361–362 (1939) (' "The fact that the testimony . . . was not challenged by evidence appropriately direct, cannot be brushed aside." Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it' (quoting *Norris* v. *Alabama*, 294 U. S. 587, 594–595 (1935))). Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers* v. *State*, 784 S. W. 2d 29, 31 (Tex. Crim. App. 1989)." *Miller-El* v. *Cockrell*, 537 U. S., at 345.

The State concedes that the manipulative minimum punishment questioning was used to create cause to strike, Brief for Respondent 33, and n. 26, but now it offers the extenuation that prosecutors omitted the 5-year information not on the basis of race, but on stated opposition to the death pen-

alty, or ambivalence about it, on the questionnaires and in the *voir dire* testimony, *id.*, at 34–35. On the State's identification of black panel members opposed or ambivalent, all were asked the trick question.[34] But the State's rationale flatly fails to explain why most white panel members who expressed similar opposition or ambivalence were not subjected to it. It is entirely true, as the State argues, *id.*, at 35, that prosecutors struck a number of nonblack members of the panel (as well as black members) for cause or by agreement before they reached the point in the standard *voir dire* sequence to question about minimum punishment. But this is no answer; 8 of the 11 nonblack individuals who voiced opposition or ambivalence were asked about the acceptable minimum only after being told what state law required.[35]

---

[34] The State puts the number of black panel members who expressed opposition or ambivalence at seven, and each received the minimum punishment ruse. Bozeman, *id.*, at 162; Fields, *id.*, at 187–188; Warren, *id.*, at 213–214; Rand, *id.*, at 270; Boggess, *id.*, at 306–307; Kennedy, *id.*, at 327–328; and Baker, *id.*, at 654. Woods, the State argues, had been revealed through questioning as a supporter of the death penalty, and accordingly he was told that five years was the statutory minimum. As explained *supra*, at 241–252, Fields and Warren were neither ambivalent nor opposed; on our analysis of black venire members opposed or ambivalent, all received the trick question, along with two proponents of capital punishment.

[35] Moses confirmed at *voir dire* that she reported on her questionnaire that she did not know the answer to Question 58, 3 Record 1141, although she did express support for the death penalty, App. 548. She was not subjected to the manipulative script. *Id.*, at 547. Crowson said that if there was a chance at rehabilitation she probably would not go with death. *Id.*, at 554. The prosecution used a peremptory strike against her but did not employ the manipulative minimum punishment script. 3 Record 1232. Vickery said he did not know how he felt about the death penalty, 4 *id.*, at 1572, but was not subjected to the manipulative script, *id.*, at 1582. Salsini thought he would have a problem in the future if he voted to impose a death sentence, App. 593, but he was not subjected to the script, *id.*, at 595. Mazza was worried about what other people would think if she imposed the death penalty, *id.*, at 354–355, but was not subjected to the script, *id.*, at 356. Witt said she did not know if she could give the death

Hence, only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away.[36]

There is a final body of evidence that confirms this conclusion. We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries, as we explained the last time the case was here.

---

penalty, 6 Record 2423, but was not subjected to the script, *id.*, at 2439. Whaley thought that she could not give the death penalty without proof of premeditation, even though Texas law did not require it, 10 *id.*, at 3750, but she was not subjected to the script, *id.*, at 3768. Hearn said that the death penalty should be given only to those who could not be rehabilitated, App. 429, but she was not subjected to the script, *id.*, at 441. The three nonblacks who expressed ambivalence or opposition and were subjected to the script were James Holtz, *id.*, at 538; Margaret Gibson, *id.*, at 514; and Fernando Gutierrez, 11–(B) Record 4397.

[36] The dissent reaches a different statistical result that supports the State's explanation. See *post*, at 302–304. There are two flaws in its calculations. First, it excises from its calculations panel members who were struck for cause or by agreement, on the theory that prosecutors knew they could be rid of those panel members without resorting to the minimum punishment ruse. See *post*, at 303. But the prosecution's calculation about whether to ask these manipulative questions occurred before prosecutors asked the trial court to strike panel members for cause and, frequently, before prosecutors and defense counsel would have reached agreement about removal. It is unlikely that prosecutors were so assured of being able to remove certain panel members for cause or by agreement that they would forgo the chance to create additional grounds for removal by employing the minimum punishment ruse. Second, as with its analysis of the panelists receiving the graphic script, the dissent characterizes certain panel members in ways that in our judgment are unconvincing. For example, for purposes of the minimum punishment analysis, the dissent considers Colleen Moses and Noad Vickery to be panelists so favorable to the prosecution that there was no need to resort to the minimum punishment ruse, *post*, at 304, yet the dissent acknowledged Moses's and Vickery's ambivalent questionnaire responses in its discussion of the graphic script, *post*, at 301.

"Although most of the witnesses [presented at the *Swain* hearing in 1986] denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

"Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. . . . A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial." *Miller-El* v. *Cockrell*, 537 U. S., at 334–335.[37]

Prosecutors here "marked the race of each prospective juror on their juror cards." *Id.*, at 347.[38]

---

[37] The material omitted from the quotation includes an excerpt from a 1963 circular given to prosecutors in the District Attorney's Office, which the State points out was not in evidence in the state trial court. The Sparling Manual, however, was before the state court.

[38] The State claimed at oral argument that prosecutors could have been tracking jurors' races to be sure of avoiding a *Batson* violation. Tr. of Oral Arg. 44. *Batson*, of course, was decided the month after Miller-El was tried.

The Court of Appeals concluded that Miller-El failed to show by clear and convincing evidence that the state court's finding of no discrimination was wrong, whether his evidence was viewed collectively or separately. 361 F. 3d, at 862. We find this conclusion as unsupportable as the "dismissive and strained interpretation" of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability. See *Miller-El* v. *Cockrell*, *supra*, at 344. It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination.

In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.

The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder,

meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.

If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.

It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous. The judgment of the Court of Appeals is reversed, and the case is remanded for entry of judgment for petitioner together with orders of appropriate relief.

It is so ordered.

JUSTICE BREYER, concurring.

In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the Court adopted a burden-shifting rule designed to ferret out the unconstitutional use of race in jury selection. In his separate opinion, Justice Thurgood Marshall predicted that the Court's rule would not achieve its goal. The only way to

"end the racial discrimination that peremptories inject into the jury-selection process," he concluded, was to "eliminat[e] peremptory challenges entirely." *Id.*, at 102–103 (concurring opinion). Today's case reinforces Justice Marshall's concerns.

I

To begin with, this case illustrates the practical problems of proof that Justice Marshall described. As the Court's opinion makes clear, Miller-El marshaled extensive evidence of racial bias. But despite the strength of his claim, Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation—including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary.

The complexity of this process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge. *Batson* seeks to square this circle by (1) requiring defendants to establish a prima facie case of discrimination, (2) asking prosecutors then to offer a race-neutral explanation for their use of the peremptory, and then (3) requiring defendants to prove that the neutral reason offered is pretextual. See *ante*, at 239. But *Batson* embodies defects intrinsic to the task.

At *Batson*'s first step, litigants remain free to misuse peremptory challenges as long as the strikes fall *below* the prima facie threshold level. See 476 U. S., at 105 (Marshall, J., concurring). At *Batson*'s second step, prosecutors need only tender a neutral reason, not a "persuasive, or even plausible," one. *Purkett* v. *Elem*, 514 U. S. 765, 768 (1995) *(per curiam);* see also *id.*, at 766 ("'mustaches and the beards look suspicious'"). And most importantly, at step three, *Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible

even to the prosecutor exercising the challenge. See 476 U. S., at 106 (Marshall, J., concurring) (noting that the unconscious internalization of racial stereotypes may lead litigants more easily to conclude "that a prospective black juror is 'sullen,' or 'distant,'" even though that characterization would not have sprung to mind had the prospective juror been white); see also Page, *Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B. U. L. Rev. 155, 161 (2005) ("'[s]ubtle forms of bias are automatic, unconscious, and unintentional'" and "'escape notice, even the notice of those enacting the bias'" (quoting Fiske, What's in a Category?: Responsibility, Intent, and the Avoidability of Bias Against Outgroups, in The Social Psychology of Good and Evil 127, 127–128 (A. Miller ed. 2004))). In such circumstances, it may be impossible for trial courts to discern if a "'seat-of-the-pants'" peremptory challenge reflects a "'seat-of-the-pants'" racial stereotype. *Batson*, 476 U. S., at 106 (Marshall, J., concurring) (quoting *id.*, at 138 (REHNQUIST, J., dissenting)).

Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem. See, *e. g.*, Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, 3 U. Pa. J. Const. L. 3, 52–53, 73, n. 197 (2001) (in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors; defense counsel struck 26% of black jurors and 54% of nonblack jurors; and race-based uses of prosecutorial peremptories declined by only 2% after *Batson*); Rose, The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County, 23 Law and Human Behavior 695, 698–699 (1999) (in one North Carolina county, 71% of excused black jurors were removed

by the prosecution; 81% of excused white jurors were removed by the defense); Tucker, In Moore's Trials, Excluded Jurors Fit Racial Pattern, Washington Post, Apr. 2, 2001, p. A1 (in D. C. murder case spanning four trials, prosecutors excused 41 blacks or other minorities and 6 whites; defense counsel struck 29 whites and 13 black venire members); Mize, A Legal Discrimination; Juries Aren't Supposed to be Picked on the Basis of Race and Sex, But It Happens All the Time, Washington Post, Oct. 8, 2000, p. B8 (authored by judge on the D. C. Superior Court); see also Melilli, *Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges, 71 Notre Dame L. Rev. 447, 462–464 (1996) (finding *Batson* challenges' success rates lower where peremptories were used to strike black, rather than white, potential jurors); Brand, The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters, 1994 Wis. L. Rev. 511, 583–589 (examining judicial decisions and concluding that few *Batson* challenges succeed); Note, *Batson* v. *Kentucky* and *J. E. B.* v. *Alabama ex rel. T. B.*: Is the Peremptory Challenge Still Preeminent? 36 Boston College L. Rev. 161, 189, and n. 303 (1994) (same); Montoya, The Future of the Post-*Batson* Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory, 29 U. Mich. J. L. Reform 981, 1006, nn. 126–127, 1035 (1996) (reporting attorneys' views on the difficulty of proving *Batson* claims).

II

Practical problems of proof to the side, peremptory challenges seem increasingly anomalous in our judicial system. On the one hand, the Court has widened and deepened *Batson*'s basic constitutional rule. It has applied *Batson*'s antidiscrimination test to the use of peremptories by criminal defendants, *Georgia* v. *McCollum*, 505 U. S. 42 (1992), by private litigants in civil cases, *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), and by prosecutors where the defendant and the excluded juror are of different races, *Powers*

v. *Ohio*, 499 U. S. 400 (1991). It has recognized that the Constitution protects not just defendants, but the jurors themselves. *Id.*, at 409. And it has held that equal protection principles prohibit excusing jurors on account of gender. See *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127 (1994). Some lower courts have extended *Batson*'s rule to religious affiliation as well. See, *e. g.*, *United States* v. *Brown*, 352 F. 3d 654, 668–669 (CA2 2003); *State* v. *Hodge*, 248 Conn. 207, 244–246, 726 A. 2d 531, 553 (1999); *United States* v. *Stafford*, 136 F. 3d 1109, 1114 (CA7 1998) (suggesting same); see also *Davis* v. *Minnesota*, 511 U. S. 1115, 1117 (1994) (THOMAS, J., dissenting from denial of certiorari). But see *Casarez* v. *State*, 913 S. W. 2d 468, 496 (Tex. Crim. App. 1994) (en banc) (declining to extend *Batson* to religious affiliation); *State* v. *Davis*, 504 N. W. 2d 767, 771 (Minn. 1993) (same).

On the other hand, the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. See, *e. g.*, Post, A Loaded Box of Stereotypes: Despite 'Batson,' Race, Gender Play Big Roles in Jury Selection., Nat. L. J., Apr. 25, 2005, pp. 1, 18 (discussing common reliance on race and gender in jury selection). For example, one jury-selection guide counsels attorneys to perform a "demographic analysis" that assigns numerical points to characteristics such as age, occupation, and marital status—in addition to race as well as gender. See V. Starr & M. McCormick, Jury Selection 193–200 (3d ed. 2001). Thus, in a hypothetical dispute between a white landlord and an African-American tenant, the authors suggest awarding two points to an African-American venire member while subtracting one point from her white counterpart. *Id.*, at 197–199.

For example, a bar journal article counsels lawyers to "rate" potential jurors "demographically (age, gender, marital status, etc.) and mark who would be under stereotypical circumstances [their] natural *enemies* and *allies*." Drake,

The Art of Litigating: Deselecting Jurors Like the Pros, 34 Md. Bar J. 18, 22 (Mar./Apr. 2001) (emphasis in original).

For example, materials from a legal convention, while noting that "nationality" is less important than "once was thought," and emphasizing that "the answers a prospective juror gives to questions are much more valuable," still point out that "[s]tereotypically" those of "Italian, French, and Spanish" origin "are thought to be pro-plaintiff as well as other minorities, such as Mexican and Jewish[;] [p]ersons of German, Scandinavian, Swedish, Finnish, Dutch, Nordic, British, Scottish, Oriental, and Russian origin are thought to be better for the defense"; African-Americans "have always been considered good for the plaintiff," and "[m]ore politically conservative minorities will be more likely to lean toward defendants." Blue, Mirroring, Proxemics, Nonverbal Communication, and Other Psychological Tools, Advocacy Track—Psychology of Trial, Association of Trial Lawyers of America Annual Convention Reference Materials, 1 Ann. 2001 ATLA–CLE 153, available at WESTLAW, ATLA–CLE database (June 8, 2005).

For example, a trial consulting firm advertises a new jury-selection technology: "Whether you are trying a civil case or a criminal case, SmartJURY™ has likely determined the exact demographics (age, race, gender, education, occupation, marital status, number of children, religion, and income) of the type of jurors you should select and the type you should strike." SmartJURY Product Information, http://www.cts-america.com/smartjury_pi.asp (as visited June 8, 2005, and available in Clerk of Court's case file).

These examples reflect a professional effort to fulfill the lawyer's obligation to help his or her client. Cf. *J. E. B.*, *supra*, at 148–149 (O'CONNOR, J., concurring) (observing that jurors' race and gender may inform their perspective). Nevertheless, the outcome in terms of jury selection is the same as it would be were the motive less benign. And as long as that is so, the law's antidiscrimination command and

a peremptory jury-selection system that permits or encourages the use of stereotypes work at cross-purposes.

Finally, a jury system without peremptories is no longer unthinkable. Members of the legal profession have begun serious consideration of that possibility. See, *e. g.*, *Alen* v. *State*, 596 So. 2d 1083, 1088–1089 (Fla. App. 1992) (Hubbart, J., concurring); Broderick, Why the Peremptory Challenge Should Be Abolished, 65 Temp. L. Rev. 369 (1992) (authored by Senior Judge on the U. S. District Court for the Eastern District of Pennsylvania); Hoffman, Peremptory Challenges Should be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809 (1997) (authored by a Colorado state-court judge); Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 199–211 (1989); Amar, Reinventing Juries: Ten Suggested Reforms, 28 U. C. D. L. Rev. 1169, 1182–1183 (1995); Melilli, 71 Notre Dame L. Rev., at 502–503; Page, 85 B. U. L. Rev., at 245–246. And England, a common-law jurisdiction that has eliminated peremptory challenges, continues to administer fair trials based largely on random jury selection. See Criminal Justice Act, 1988, ch. 33, § 118(1), 22 Halsbury's Statutes 357 (4th ed. 2003 reissue) (U. K.); see also 2 Jury Service in Victoria, Final Report, ch. 5, p. 165 (Dec. 1997) (1993 study of English barristers showed majority support for system without peremptory challenges).

III

I recognize that peremptory challenges have a long historical pedigree. They may help to reassure a party of the fairness of the jury. But long ago, Blackstone recognized the peremptory challenge as an "arbitrary and capricious species of [a] challenge." 4 W. Blackstone, Commentaries on the Laws of England 346 (1769). If used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function. See 1 A. de

Tocqueville, Democracy in America 287 (H. Reeve transl., rev. ed. 1900) ("[T]he institution of the jury raises the people . . . to the bench of judicial authority [and] invests [them] with the direction of society"); A. Amar, The Bill of Rights 94–96 (1998) (describing the Founders' vision of juries as venues for democratic participation); see also Stevens, Foreword, Symposium: The Jury at a Crossroad: The American Experience, 78 Chi.-Kent L. Rev. 907, 907–908 (2003) (citizens should not be denied the opportunity to serve as jurors unless an impartial judge states a reason for the denial, as with a strike for cause). The "scientific" use of peremptory challenges may also contribute to public cynicism about the fairness of the jury system and its role in American government. See, *e. g.*, S. O'Connor, Juries: They May Be Broke, But We Can Fix Them, Chautauqua Institution Lecture, July 6, 1995. And, of course, the right to a jury free of discriminatory taint is constitutionally protected—the right to use peremptory challenges is not. See *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); see also *Ross* v. *Oklahoma*, 487 U. S. 81, 88 (1988) (defendant's loss of a peremptory challenge does not violate his right to an impartial jury).

Justice Goldberg, dissenting in *Swain* v. *Alabama*, 380 U. S. 202 (1965), wrote, "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." *Id.*, at 244; see also *Batson*, 476 U. S., at 107 (Marshall, J., concurring) (same); *Edmonson*, 500 U. S., at 630 (opinion for the Court by KENNEDY, J.) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution"). This case suggests the need to confront that choice. In light of the considerations I have mentioned, I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole. With that qualification, I join the Court's opinion.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

In the early morning hours of November 16, 1985, petitioner Thomas Joe Miller-El and an accomplice, Kennard Flowers, robbed a Holiday Inn in Dallas, Texas. Miller-El and Flowers bound and gagged hotel employees Donald Hall and Doug Walker, and then laid them face down on the floor. When Flowers refused to shoot them, Miller-El shot each twice in the back, killing Walker and rendering Hall a paraplegic. Miller-El was convicted of capital murder by a jury composed of seven white females, two white males, a black male, a Filipino male, and a Hispanic male.

For nearly 20 years now, Miller-El has contended that prosecutors peremptorily struck potential jurors on the basis of race. In that time, seven state and six federal judges have reviewed the evidence and found no error. This Court concludes otherwise, because it relies on evidence never presented to the Texas state courts. That evidence does not, much less "clear[ly] and convincing[ly]," show that the State racially discriminated against potential jurors. 28 U. S. C. § 2254(e)(1). However, we ought not even to consider it: In deciding whether to grant Miller-El relief, we may look only to "the evidence presented in the State court proceeding." § 2254(d)(2). The majority ignores that restriction on our review to grant Miller-El relief. I respectfully dissent.

I

Miller-El requests federal habeas relief from a state-court judgment, and hence our review is controlled by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Because Miller-El's claim of racial discrimination in jury selection was adjudicated on the merits in Texas state court, AEDPA directs that a writ of habeas corpus *"shall not be granted"* unless the state court's decision "was based on an unreasonable determination of the facts *in*

light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2) (emphasis added).

To obtain habeas relief, then, Miller-El must show that, based on the evidence before the Texas state courts, the only reasonable conclusion was that prosecutors had racially discriminated against prospective jurors. He has not even come close to such a showing. The state courts held two hearings, but despite ample opportunity, Miller-El presented little evidence that discrimination occurred during jury selection. In view of the evidence actually presented to the Texas courts, their conclusion that the State did not discriminate was eminently reasonable. As a close look at the state-court proceedings reveals, the majority relies almost entirely on evidence that Miller-El has never presented to any Texas state court.

A

Jury selection in Miller-El's trial took place over five weeks in February and March 1986. During the process, 19 of the 20 blacks on the 108-person venire panel were not seated on the jury: 3 were dismissed for cause, 6 were dismissed by the parties' agreement, and 10 were peremptorily struck by prosecutors. Miller-El objected to 8 of these 10 strikes, asserting that the prosecutors were discriminating against black veniremen. Each time, the prosecutors proffered a race-neutral, case-related reason for exercising the challenge, and the trial court permitted the venireman to be removed. The remaining black venireman, Troy Woods, served on the jury that convicted Miller-El.

At the completion of *voir dire*, Miller-El moved to strike the jury under this Court's decision in *Swain* v. *Alabama*, 380 U. S. 202 (1965), which required Miller-El to prove "systematic exclusion of black persons through the use of peremptories over a period of time." *Powers* v. *Ohio*, 499 U. S. 400, 405 (1991). At the pretrial *Swain* hearing in March 1986, Miller-El presented three types of documentary evidence: the juror questionnaires of the 10 black veniremen

struck by the State; excerpts from a series of newspaper articles on racial bias in jury selection; and a manual on jury selection in criminal cases authored by a former Dallas County prosecutor. The *voir dire* transcript was part of the official record. Miller-El, however, introduced none of the other 98 juror questionnaires, no juror cards, and no evidence related to jury shuffling. See *ante*, at 256–257, n. 15.

Miller-El also presented nine witnesses, five of whom had spent time as prosecutors in the Dallas County District Attorney's (D. A.) Office and five of whom were current or former judges in Dallas County. Their testimony made three things clear. First, the D. A.'s Office had never officially sanctioned or promoted racial discrimination in jury selection, as several witnesses testified, including the county's Chief Public Defender as well as one of the first black prosecutors to serve in the D. A.'s Office. App. 842 (Baraka); *id.*, at 846–848 (Tait); *id.*, at 860 (Entz); *id.*, at 864 (Kinkeade). Second, witnesses testified that, despite the absence of any official policy, individual prosecutors had almost certainly excluded blacks in particular cases. *Id.*, at 830, 833 (Hampton); *id.*, at 841–842 (Baraka); *id.*, at 846–848 (Tait); *id.*, at 863–864 (Kinkeade). Third and most important, no witness testified that the prosecutors in Miller-El's trial—Norman Kinne, Paul Macaluso, and Jim Nelson—had ever engaged in racially discriminatory jury selection. *Id.*, at 843 (Baraka); *id.*, at 859 (Entz); *id.*, at 863 (Kinkeade). The trial court concluded that, although racial discrimination "may have been done by individual prosecutors in individual cases," there was no evidence of "any systematic exclusion of blacks as a matter of policy by the District Attorney's office." *Id.*, at 882–883.

Miller-El was then tried, convicted, and sentenced to death. While his appeal was pending, this Court decided *Batson* v. *Kentucky*, 476 U. S. 79 (1986). *Batson* announced a new three-step process for evaluating claims that a prosecutor used peremptory challenges to strike prospective jurors because of their race:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El* v. *Cockrell*, 537 U. S. 322, 328–329 (2003) *(Miller-El I)*.

The Texas Court of Criminal Appeals remanded Miller-El's case for a hearing to be held under *Batson*.

B

At the *Batson* hearing in May 1988, before the same judge who had presided over his trial, Miller-El sought to establish that prosecutors at his trial had struck potential jurors on the basis of their race. To make his prima facie case, Miller-El reintroduced some of what he had presented two years earlier at the *Swain* hearing: the testimony of the nine witnesses, the 10 juror questionnaires, and the excerpted newspaper articles. App. 893–895. The court instructed the State to explain its strikes. *Id.*, at 898–899. Of the 10 peremptory strikes at issue, prosecutors had already explained 8 at trial in response to Miller-El's objections. The State therefore called Paul Macaluso, one of the prosecutors who had conducted the *voir dire*, to testify regarding his reasons for striking veniremen Paul Bailey and Joe Warren.

Macaluso testified that he had struck Bailey because Bailey seemed firmly opposed to the death penalty, even though Bailey tempered his stance during *voir dire*. *Id.*, at 905–906. This was accurate. Bailey expressed forceful opposition to the death penalty when questioned by Macaluso. See, *e. g.*, 11–(A) Record of *Voir Dire* 4110 (hereinafter Record) ("I don't believe in capital punishment. Like I said on [my juror questionnaire], I don't believe anyone has the right to take another person's life"); *id.*, at 4112 (saying that he

felt "[v]ery strongly" that the State should not impose the death penalty). Later, however, when questioned by defense counsel, Bailey said that he could impose the death penalty if the State proved the necessary aggravating circumstances. *Id.*, at 4148–4150, 4152. When the trial court overruled the State's challenge for cause, the State exercised a peremptory challenge. *Id.*, at 4168.

Macaluso next testified that he dismissed venireman Warren because Warren gave inconsistent answers regarding his ability to apply the death penalty and because Warren's brother had been recently convicted. App. 908–910. Macaluso conceded that Warren was not as clearly unfavorable to the State as Bailey. *Id.*, at 911. Nevertheless, Macaluso struck Warren because it was early in the jury selection process and the State had plenty of remaining peremptories with which it could remove marginal jurors. Macaluso candidly stated that he might not have removed Warren if fewer peremptories had been available. *Id.*, at 910.

After the State presented nonracial, case-related reasons for all its strikes, the focus shifted to *Batson*'s third step: whether Miller-El had "carried his burden of proving purposeful discrimination." *Purkett* v. *Elem*, 514 U. S. 765, 768 (1995) *(per curiam); Batson, supra,* at 97–98. At this point, Miller-El stood on his *Swain* evidence. App. 921. That evidence bore on whether some Dallas County prosecutors had discriminated generally in past years; none of the evidence indicated that the prosecutors at Miller-El's trial—Kinne, Macaluso, and Nelson—had discriminated in the selection of Miller-El's jury. Moreover, none of this generalized evidence came close to demonstrating that the State's explanations were pretextual in Miller-El's particular trial. Miller-El did not even attempt to rebut the State's racially neutral reasons at the hearing. He presented no evidence and made no arguments. *Id.*, at 919–922.

Nevertheless, the majority concludes that the trial judge was unreasonable in finding as a factual matter that the

State did not discriminate against black veniremen. *Ante*, at 266. That is not so "in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2). From the scanty evidence presented to the trial court, "it is at least reasonable to conclude" that purposeful discrimination did not occur, "which means that the state court's determination to that effect must stand." *Early* v. *Packer*, 537 U. S. 3, 11 (2002) *(per curiam)*.

II

Not even the majority is willing to argue that the evidence before the state court shows that the State discriminated against black veniremen. Instead, it bases its decision on juror questionnaires and juror cards that Miller-El's new attorneys unearthed during his federal habeas proceedings and that he never presented to the state courts.[1] *Ante*, at 256–257, n. 15. Worse still, the majority marshals those documents in support of theories that Miller-El never argued to the state courts. AEDPA does not permit habeas petitioners to engage in this sort of sandbagging of state courts.

A

The majority discusses four types of evidence: (1) the alleged similarity between black veniremen who were struck by the prosecution and white veniremen who were not; (2) the apparent disparate questioning of black and white veniremen with respect to their views on the death penalty and their ability to impose the minimum punishment; (3) the use of the "jury shuffle" by the prosecution; and (4) evidence of historical discrimination by the D. A.'s Office in the selection of juries. Only the last was ever put before the Texas courts—and it does not prove that any constitutional viola-

[1] The supplemental material appears in a joint lodging submitted by the parties. It includes the State's copies of questionnaires for 12 prospective jurors (11 of whom served at Miller-El's trial) and the State's juror cards for all 108 members of the venire panel.

tion occurred at Miller-El's trial. The majority's discussion of the other types of evidence relies on documents like juror questionnaires and juror cards that were added to the record before the District Court.

The majority's willingness to reach outside the state-court record and embrace evidence never presented to the Texas state courts is hard to fathom. AEDPA mandates that the reasonableness of a state court's factual findings be assessed "in light of the evidence presented in the State court proceeding," 28 U. S. C. § 2254(d)(2), and also circumscribes the ability of federal habeas litigants to present evidence that they "failed to develop" before the state courts. § 2254(e)(2); *Williams* v. *Taylor*, 529 U. S. 420, 429–430 (2000). Miller-El did not argue disparate treatment or disparate questioning at the *Batson* hearing, so he had no reason to submit the juror questionnaires or cards to the trial court. However, Miller-El could have developed and presented all of that evidence at the *Batson* hearing.[2] Consequently, he must satisfy § 2254(e)(2)'s requirements to adduce the evidence in federal court—something he cannot do. *Williams*, *supra*, at 437 ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings"). For instance, there is no doubt that Miller-El's supplemental material could have been "previously discovered through the exercise of due diligence." § 2254(e)(2)(A)(ii).

Just last Term, we summarily reversed the Court of Appeals for the Sixth Circuit for doing what the Court does

---

[2] The juror questionnaires had been in Miller-El's possession since before the 1986 *Swain* hearing; Miller-El's attorneys used them during the *voir dire*. But because Miller-El did not argue disparate treatment or questioning at the *Batson* hearing, Miller-El's attorneys had no reason to submit the questionnaires to the trial court. The juror cards could have been requested at any point under the Texas Public Information Act. See Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence, Record in No. 00–10784 (CA5), p. 2494.

here: granting habeas relief on the basis of evidence not presented to the state court. See *Holland* v. *Jackson*, 542 U. S. 649, 652 (2004) *(per curiam)*. We reaffirmed "that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Ibid.*; see also *Miller-El I*, 537 U. S., at 348 ("[P]etitioner must demonstrate that a state court's . . . factual determination was 'objectively unreasonable' in light of the record before the court"). In an about-face, the majority now reverses the Court of Appeals for the Fifth Circuit for *failing* to grant habeas relief on the basis of evidence not before the state court. By crediting evidence that Miller-El never placed before the state courts, the majority flouts AEDPA's plain terms and encourages habeas applicants to attack state judgments collaterally with evidence never tested by the original triers of fact.

B

The majority presents three arguments for ignoring AEDPA's requirement that the state-court decision be unreasonable "in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2). None is persuasive.

1

First, without briefing or argument on the question, the majority hints that we may ignore AEDPA's limitation on the record under § 2254(d)(2) because the parties have ignored it. *Ante*, at 256–257, n. 15. The majority then quickly retreats and expressly does not decide the question. *Ibid.* But its retreat is as inexplicable as its advance: Unless § 2254(d)(2) is waivable and the parties have waived it, the majority cannot consider evidence outside the state-court proceedings, as it concededly does.

The majority's venture beyond the state-court record is indefensible. Even if § 2254(d) is not jurisdictional, but see *Lindh* v. *Murphy*, 521 U. S. 320, 343–344 (1997) (REHNQUIST,

C. J., dissenting), "it shares the most salient characteristic of jurisdictional statutes: Its commands are addressed to courts rather than to individuals," *id.*, at 344. Section 2254(d) speaks directly to federal courts when it states that a habeas application by a state prisoner *"shall not be granted"* except under the specified conditions. (Emphasis added); *ibid.* The strictures of § 2254(d) are not discretionary or waivable. Through AEDPA, Congress sought to ensure that federal courts would defer to the judgments of state courts, not the wishes of litigants.

Nevertheless, there is no need to decide whether § 2254(d)(2) may be waived, for the State has not waived it. Contrary to the majority's assertions, *ante*, at 256–257, n. 15, the State has argued that § 2254(d)(2) bars our review of certain evidence not before the state trial court, Brief for Respondent 41–42, just as it did in its last appearance, see Brief for Respondent in *Miller-El I*, O. T. 2002, No. 01–7662, pp. 28–29, 39. The majority is correct that the State has not argued § 2254(d)(2) precludes consideration of the juror questionnaires and juror cards in particular, *ante*, at 256–257, n. 15, but the majority does not assert that the State may selectively invoke § 2254(d)(2) to cherry-pick only favorable evidence that lies outside the state-court record.

2

The majority next suggests that the supplemental material, particularly the juror questionnaires, might not expand on what the state trial court knew, since "the same judge presided over the *voir dire*, the *Swain* hearing, and the *Batson* hearing, and the jury questionnaires were subjects of reference at the *voir dire*." *Ante*, at 257, n. 15. This is incorrect. At the *Batson* hearing, Miller-El introduced into evidence only the questionnaires of the 10 black veniremen peremptorily struck by the State. App. 893–895. The questionnaires of the other 98 veniremen—including many on which the majority relies—were never introduced into ev-

idence or otherwise placed before the trial judge. Miller-El and the State had copies; the trial judge did not.

Yet the majority insinuates that the questionnaires effectively were before the state court because they "were subjects of reference at the *voir dire*." *Ante*, at 257, n. 15. That is extremely misleading on the facts of this case. Although counsel for Miller-El and the State questioned witnesses partially on the basis of their questionnaire responses, the lawyers' references to questionnaires were scattered and sporadic. Even the majority does not attempt to show that the specific questionnaire responses on which it relies were called to the trial court's attention. Clearly they were not called to the trial court's attention at the only time that mattered: the *Batson* hearing.

The majority's insinuation is doubly misleading when coupled with its insistence that "the transcript of *voir dire* . . . was before the state courts." *Ante*, at 242, n. 2. Miller-El's arguments gave the state court no reason to go leafing through the *voir dire* transcript. What is more, *voir dire* at Miller-El's trial lasted five weeks, and the transcript occupies 11 volumes numbering 4,662 pages. To think that two years after the fact a trial court should dredge up on its own initiative passing references to unseen questionnaires—references buried in a more than 4,600-page transcript no less—is unrealistic. That is why § 2254(d)(2) demands that state courts be taken to task only on the basis of evidence "presented in the State court proceeding." The 98 questionnaires before the parties, unlike the 10 questionnaires that Miller-El entered into evidence, were not "presented" to the state court.

The majority also asserts that by considering the questionnaires, it is only attempting to help the State. After all, the State claims that any disparate questioning and treatment of black and white veniremen resulted from their questionnaires, not their respective races. As the majority sees it, if the questionnaires are not properly before us, then the State cannot substantiate its defense.

This is a startling repudiation of both *Batson* and AEDPA. A strong presumption of validity attaches to a trial court's factual finding at *Batson*'s third step, *Hernandez* v. *New York*, 500 U. S. 352, 364 (1991) (plurality opinion); *id.*, at 372 (O'CONNOR, J., concurring in judgment); see also *Batson*, 476 U. S., at 98, n. 21, and that presumption is doubly strong when the *Batson* finding is under collateral attack in habeas, *Miller-El I*, 537 U. S., at 340. Thus, it is Miller-El's burden to prove racial discrimination under *Batson*, and it is his burden to prove it by clear and convincing evidence under AEDPA. Without the questionnaires never submitted to the trial court, Miller-El comes nowhere near establishing that race motivated any disparate questioning or treatment, which is precisely why the majority must strain to include the questionnaires within the state-court record.

That Miller-El needs the juror questionnaires could not be clearer in light of how the *Batson* hearing unfolded. After offering racially neutral reasons for all of its strikes, the State could have remained silent—as Miller-El did. However, the State pointed out, among other things, that any disparate questioning of black and white veniremen was based on answers given on the juror questionnaires or during the *voir dire* process. App. 920–921. The State further noted that Miller-El had never alleged disparate treatment of black and white veniremen. *Id.*, at 921. Because Miller-El did not dispute the State's assertions, there was no need for the State to enter the juror questionnaires into the record. There was nothing to argue about. Miller-El had presented only generalized evidence of historical discrimination by the D. A.'s Office, which no one believes was sufficient in itself to prove a *Batson* violation. That is why Miller-El, not the State, marshaled supplemental material during his federal habeas proceedings. Without that evidence, he cannot prove now what he never attempted to prove 17 years ago: that the State's justifications for its strikes were a pretext for discrimination.

3

Finally, the majority suggests that the 2-year delay between the *voir dire* and the post-trial *Batson* hearing is reason for weakened deference. See *ante*, at 241, n. 1. This is an argument not for setting aside § 2254(d)(2)'s limit on the record, but for relaxing the level of deference due state courts' factual findings under §§ 2254(d)(2) and (e)(1). The presumption of correctness afforded factual findings on habeas review, however, does not depend on the manner in which the trial court reaches its factual findings, for reasons I have explained before. *Miller-El I*, *supra*, at 357–359 (dissenting opinion). The majority leaves those arguments unanswered.

The majority's own argument is implausible on its face: "'[T]he usual risks of imprecision and distortion from the passage of time'" are far greater after 17 years than after 2. *Ante*, at 241, n. 1 (quoting *Miller-El I*, *supra*, at 343). The majority has it just backward. The passage of time, as AEDPA requires and as this Court has held, counsels in favor of *more* deference, not less. At least the trial court, unlike this Court, had the benefit of gauging the witnesses' and prosecutors' credibility at both the *Swain* and *Batson* hearings. *Miller-El I*, *supra*, at 339 ("Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations"); see also *Hernandez*, *supra*, at 364 (plurality opinion); *Batson*, *supra*, at 98, n. 21.

III

Even taken on its own terms, Miller-El's cumulative evidence does not come remotely close to clearly and convincingly establishing that the state court's factual finding was unreasonable. I discuss in turn Miller-El's four types of evidence: (1) the alleged disparate treatment and (2) disparate questioning of black and white veniremen; (3) the prosecu-

tion's jury shuffles; and (4) historical discrimination by the D. A.'s Office in the selection of juries. Although each type of evidence "is open to judgment calls," *ante*, at 265, the majority finds that a succession of unpersuasive arguments amounts to a compelling case. In the end, the majority's opinion is its own best refutation: It strains to demonstrate what should instead be patently obvious.

A

The majority devotes the bulk of its opinion to a side-by-side comparison of white panelists who were allowed to serve and two black panelists who were struck, Billy Jean Fields and Joe Warren. *Ante*, at 240–252. The majority argues that the prosecution's reasons for striking Fields and Warren apply equally to whites who were permitted to serve, and thus those reasons must have been pretextual. The *voir dire* transcript reveals that the majority is mistaken.

It is worth noting at the outset, however, that Miller-El's and the Court's claims have always been a moving target. Of the 20 black veniremen at Miller-El's trial, 9 were struck for cause or by the parties' agreement, and 1 served on the jury. Miller-El claimed at the *Batson* hearing that all 10 remaining black veniremen were dismissed on account of race. That number dropped to 7 on appeal, and then again to 6 during his federal habeas proceedings. Of those 6 black veniremen, this Court once found debatable that the entire lot was struck based on race. *Miller-El I*, *supra*, at 343. However, 4 (Carrol Boggess, Roderick Bozeman, Wayman Kennedy, and Edwin Rand) were dismissed for reasons other than race, as the majority effectively concedes. *Ante*, at 252–253, n. 11; *Miller-El I*, *supra*, at 351–354 (SCALIA, J., concurring).

The majority now focuses exclusively on Fields and Warren. But Warren was obviously equivocal about the death penalty. In the end, the majority's case reduces to a single venireman, Fields, and its reading of a 20-year-old *voir dire*

transcript that is ambiguous at best. This is the antithesis of clear and convincing evidence.

1

From the outset of questioning, Warren did not specify when he would vote to impose the death penalty. When asked by prosecutor Paul Macaluso about his ability to impose the death penalty, Warren stated, "[T]here are some cases where I would agree, you know, and there are others that I don't." 3 Record 1526. Macaluso then explained at length the types of crimes that qualified as capital murder under Texas law, and asked whether Warren would be able to impose the death penalty for those types of heinous crimes. *Id.*, at 1527–1530. Warren continued to hedge: "I would say it depends on the case and the circumstances involved at the time." *Id.*, at 1530. He offered no sense of the circumstances that would lead him to conclude that the death penalty was an appropriate punishment.

Macaluso then changed tack and asked whether Warren believed that the death penalty accomplished any social purpose. *Id.*, at 1531–1532. Once again, Warren proved impossible to pin down: "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." *Id.*, at 1532. Macaluso then focused on what the death penalty accomplished in those cases where Warren believed it useful. *Ibid.* Even then, Warren expressed no firm view:

> "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment." *Ibid.*

While Warren's ambivalence was driven by his uncertainty that the death penalty was severe enough, *ante*, at 250–251,

that is beside the point. Throughout the examination, Warren gave no indication whether or when he would prefer the death penalty to other forms of punishment, specifically life imprisonment. 3 Record 1532–1533. To prosecutors seeking the death penalty, the reason for Warren's ambivalence was irrelevant.

At *voir dire*, there was no dispute that the prosecution struck Warren not for his race, but for his ambivalence on the death penalty. Miller-El's attorneys did not object to the State's strikes of Warren or Paul Bailey, though they objected to the removal of every other black venireman. Both Bailey and Warren shared the same characteristic: It was not clear, based on their questionnaires and *voir dire* testimony, that they could impose the death penalty. See *supra*, at 277–278. In fact, Bailey was so clearly struck for nonracial reasons that Miller-El has never objected to his removal at any stage in this case.

There also was no question at the *Batson* hearing why the prosecution struck Warren. Macaluso testified:

> "I thought [Warren's statements on *voir dire*] were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more." App. 909.

In addition, Macaluso noted that Warren's brother recently had been convicted for a crime involving food stamps. *Id.*, at 909–910. This suggested that Warren might be more sympathetic to defendants than other jurors. Macaluso was quite candid that Warren was not as obviously disfavorable to the State as Bailey, and Macaluso stated that he might not have exercised a peremptory against Warren later in jury selection. *Id.*, at 910–911. But Macaluso used only his 6th of 15 peremptory challenges against Warren.

According to the majority, Macaluso testified that he struck Warren for his statement that the death penalty was "'an easy way out,'" *ante*, at 248 (quoting App. 909), and not for his ambivalence about the death penalty, *ante*, at 250–251. This grossly mischaracterizes the record. Macaluso specifically testified at the *Batson* hearing that he was troubled by the "*inconsisten[cy]*" of Warren's responses. App. 909 (emphasis added). Macaluso was speaking of Warren's ambivalence about the death penalty, a reason wholly unrelated to race. This was Macaluso's "stated reason," and Macaluso ought to "stand or fall on the plausibility" of this reason—not one concocted by the majority. *Ante*, at 252.

The majority points to four other panel members—Kevin Duke, Troy Woods, Sandra Jenkins, and Leta Girard—who supposedly expressed views much like Warren's, but who were not struck by the State. *Ante*, at 248. According to the majority, this is evidence of pretext. But the majority's premise is faulty. None of these veniremen was as difficult to pin down on the death penalty as Warren. For instance, Duke supported the death penalty. App. 373 ("I've always believed in having the death penalty. I think it serves a purpose"); *ibid.* ("I mean, it's a sad thing to see, to have to kill someone, but they shouldn't have done the things that they did. Sometimes they deserve to be killed"); *id.*, at 394 ("If I feel that I can answer all three of these [special-issue] questions yes and I feel that he's done a crime worthy of the death penalty, yes, I will give the death penalty"). By contrast, Warren never expressed a firm view one way or the other.

Troy Woods, who was black and who served on the jury, was even more supportive of the death penalty than Duke. The majority suggests that prosecutors might have allowed Woods to serve on the jury because they were running low on peremptories or they wanted to obscure a pattern of discrimination. *Ante*, at 249–250. That such rank conjecture

can serve as "clear and convincing evidence" is error in its own right, but it is also belied by the record. Woods said that capital punishment was "too quick" because defendants "don't feel the pain." App. 409. When asked what sort of punishment defendants ought to receive, Woods said that he would "[p]our some honey on them and stake them out over an ant bed." *Ibid.* He testified that he would mete out such sentences because if defendants "survive for a length of time, that would be enough punishment and . . . they wouldn't do it again." *Id.*, at 410 (alteration omitted). Woods also testified that he was a lifelong believer in the death penalty, *id.*, at 410–411; that he could impose death generally as a juror, *id.*, at 413; and that he could impose death for murder during the course of a robbery, the specific crime of which Miller-El stood accused, *ibid.* It is beyond cavil why the State accepted Woods as a juror: He could impose the punishment sought by the State.

Nevertheless, even assuming that any of these veniremen expressed views similar to Warren's, Duke, Woods, and Girard were questioned much later in the jury selection process, when the State had fewer peremptories to spare. Only Sandra Jenkins was questioned early in the *voir dire* process, and thus only Jenkins was even arguably similarly situated to Warren. However, Jenkins and Warren were different in important respects. Jenkins expressed no doubt whatsoever about the death penalty. She testified that she had researched the death penalty in high school, and she said in response to questioning by both parties that she strongly believed in the death penalty's value as a deterrent to crime. 3 Record 1074–1075, 1103–1104. This alone explains why the State accepted Jenkins as a juror, while Miller-El struck her. In addition, Jenkins did not have a relative who had been convicted of a crime, but Warren did. At the *Batson* hearing, Macaluso testified that he struck Warren both for Warren's inconsistent responses regarding the death penalty and for his brother's conviction. *Supra*, at 278.

The majority thinks it can prove pretext by pointing to white veniremen who match only one of the State's proffered reasons for striking Warren. *Ante*, at 248. This defies logic. "'Similarly situated' does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them." *Miller-El I*, 537 U. S., at 362–363 (THOMAS, J., dissenting); cf. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 683 (1983) (Title VII of the Civil Rights Act of 1964 discrimination occurs when an employee is treated "'"in a manner which but for that person's sex would be different"'" (quoting *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978))). Given limited peremptories, prosecutors often must focus on the potential jurors most likely to disfavor their case. By ignoring the totality of reasons that a prosecutor strikes any particular venireman, it is the majority that treats potential jurors as "products of a set of cookie cutters," *ante*, at 247, n. 6—as if potential jurors who share only some among many traits must be treated the same to avoid a *Batson* violation. Of course jurors must not be "identical in all respects" to gauge pretext, *ante*, at 247, n. 6, but to isolate race as a variable, the jurors must be comparable in all respects that the prosecutor proffers as important. This does not mean "that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror." *Ibid.* It means that a defendant cannot support a *Batson* claim by comparing veniremen of different races unless the veniremen are truly similar.

2

The second black venireman on whom the majority relies is Billy Jean Fields. Fields expressed support for the death penalty, App. 174–175, but Fields also expressed views that called into question his ability to impose the death penalty. Fields was a deeply religious man, *id.*, at 173–174, 192–194, and prosecutors feared that his religious convictions might make him reluctant to impose the death penalty. Those

fears were confirmed by Fields' view that all people could be rehabilitated if introduced to God, a fear that had special force considering the special-issue questions necessary to impose the death penalty in Texas. One of those questions asked whether there was a probability that the defendant would engage in future violence that threatened society. When they reached this question, Macaluso and Fields had the following exchange:

> "[MACALUSO:] What does that word probability mean to you in that connotation?
>
> "[FIELDS:] Well, it means is there a possibility that [a defendant] will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.
>
> "[MACALUSO:] Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?
>
> "[FIELDS:] No.
>
> "[MACALUSO:] You think everyone can be rehabilitated?
>
> "[FIELDS:] Yes." *Id.*, at 183–184.

Thus, Fields indicated that the possibility of rehabilitation was ever-present and relevant to whether a defendant might commit future acts of violence. In light of that view, it is understandable that prosecutors doubted whether he could vote to impose the death penalty.

Fields did testify that he could impose the death penalty, even on a defendant who could be rehabilitated. *Id.*, at 185. For the majority, this shows that the State's reason was pretextual. *Ante*, at 244. But of course Fields said that he could fairly consider the death penalty—if he had answered otherwise, he would have been challengeable *for cause*. The point is that Fields' earlier answers cast significant doubt on whether he could impose the death penalty. The very purpose of peremptory strikes is to allow parties to

remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias. See *Swain*, 380 U. S., at 220; *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 148 (1994) (O'CONNOR, J., concurring). Based on Fields' *voir dire* testimony, it was perfectly reasonable for prosecutors to suspect that Fields might be swayed by a penitent defendant's testimony.[3] The prosecutors may have been worried for nothing about Fields' religious sentiments, but that does not mean they were instead worried about Fields' race.

As with Warren, the majority attempts to point to similarly situated nonblack veniremen who were not struck by the State, but its efforts again miss their mark for several reasons. First, the majority would do better to begin with white veniremen who *were* struck by the State. For instance, it skips over Penny Crowson, a white panelist who expressed a firm belief in the death penalty, but who also stated that she probably would not impose the death penalty if she believed there was a chance the defendant could be rehabilitated. *Ante*, at 245, n. 5; 3 Record 1211. The State struck Crowson, which demonstrates that it "was concerned

---

[3] The majority argues that prosecutors mischaracterized Fields' testimony when they struck him. *Ante*, at 244. This is partially true but wholly irrelevant. When Miller-El's counsel suggested that Fields' strike was related to race, prosecutor Jim Nelson responded:

"[W]e're certainly not exercising a preemptory *[sic]* strike on Mr. Fields because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." App. 197 (alteration omitted).

Nelson partially misstated Fields' testimony. Fields had not said that he would give the death penalty only if a person was beyond rehabilitation, *id.*, at 185, but he had said that any person could be rehabilitated if introduced to God, *id.*, at 184. This is precisely why prosecutors were concerned that Fields' "religious feelings [might] affect his jury service." *Id.*, at 197.

about views on rehabilitation when the venireperson was not black." *Ante*, at 245, n. 4.

Second, the nonblack veniremen to whom the majority points—Sandra Hearn, Mary Witt, and Fernando Gutierrez—were more favorable to the State than Fields for various reasons.[4] For instance, Sandra Hearn was adamant about the value of the death penalty for callous crimes. App. 430, 451–452. Miller-El, of course, shot in cold blood two men who were lying before him bound and gagged. In addition, Hearn's father was a special agent for the Federal Bureau of Investigation, and her job put her in daily contact with police officers for whom she expressed the utmost admiration. *Id.*, at 445–446, 457–460. This is likely why the State accepted Hearn and Miller-El challenged her for cause. *Id.*, at 447, 467.

In fact, on appeal Miller-El's counsel had this to say about Hearn: "If ever—if ever—there was a Venireperson that should have been excluded *for cause* from the Jury in this case, or any capital Murder Jury, it was Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs." *Id.*, at 1015 (emphasis added and alteration omitted); see also *id.*, at 1010. This same juror whom Miller-El's counsel once found so repugnant has been transformed by the majority's revisionist history into a *defense-prone* juror just as objectionable to the State as Fields. *Ante*, at 244.

---

[4] In explaining why veniremen Hearn, Witt, and Gutierrez were more favorable to the State than Fields, the majority faults me for "focus[ing] on reasons the prosecution itself did not offer." *Ante*, at 245, n. 4. The majority's complaint is hard to understand. The State *accepted* Hearn, Witt, and Gutierrez. Although it is apparent from the *voir dire* transcript why the State wanted to seat these veniremen on the jury, it was never required to "offer" its reasons for doing so. If the majority instead means that I focus on whether these veniremen opposed the death penalty and whether they had relatives with significant criminal histories, those are precisely the reasons offered by the State for its strike of Fields.

Mary Witt did not even have the same views on rehabilitation as Fields: She testified to the commonplace view that some, but not all, people can be rehabilitated. 6 Record 2461. Moreover, Witt expressed strong support for the death penalty. *Id.*, at 2414–2416, 2443–2444. She testified that the death penalty was appropriate for the crime of murder in the course of a robbery, *id.*, at 2428, or for a convict who was released from prison and committed murder (Miller-El previously had twice spent time in prison for armed robberies), *id.*, at 2462–2463. This is likely why the State accepted Witt and Miller-El struck her. *Id.*, at 2464–2465. Finally, Fernando Gutierrez testified that he could impose the death penalty for brutal crimes. 11–(B) Record 4391–4392. In fact, the only issue during *voir dire* was whether Gutierrez could apply Texas' more lenient penalties, not its more severe ones. *Id.*, at 4398–4399, 4413–4414, 4431. The court questioned Gutierrez at length, and ultimately he was accepted by both parties and seated on the jury. *Id.*, at 4439–4449.

Third, Hearn, Witt, and Gutierrez were not similarly situated to Fields even apart from their views on the death penalty. Fields was dismissed not only for his prodefense views on rehabilitation, but also because his brother had several drug convictions and had served time in prison. App. 190, 199. Hearn, Witt, and Gutierrez did not have relatives with significant criminal histories. Thus, there was an additional race-neutral reason to dismiss Fields that simply was not true of the other jurors. Surely the State did not need to expend peremptories on all veniremen who expressed some faith in rehabilitation to avoid violating *Batson*.

The majority dismisses as "makeweight" the State's justification as to Fields' brother, *ante*, at 246, but it is the majority's arguments that are contrived. The State questioned Fields during *voir dire* about his brother's drug offenses, where the offenses occurred, whether his brother had been tried, whether his brother had been convicted, and whether

his brother's criminal history would affect Fields' ability to serve on the jury. App. 190. The State did not fail to engage in a "'meaningful voir dire examination,'" as the majority contends. *Ante*, at 246 (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

The majority also contends that the State's justification as to Fields' brother illustrates pretext, because the State first pointed to Fields' views on rehabilitation as the reason for its strike. *Ante*, at 245–246. The timing of the State's explanation was unexceptional. In context, the State discussed Fields' brother at essentially the same time it discussed Fields' religious views. The entire exchange between the State and counsel for Miller-El took place in a couple of minutes at most. App. 197–199. Thus, to call the State's second reason an "afterthought," *ante*, at 246, ignores what is obvious even from a cold record: that the State simply offered both of its reasons in quick succession.

B

Miller-El's claims of disparate questioning also do not fit the facts. Miller-El argues, and the majority accepts, that the prosecution asked different questions at *voir dire* of black and nonblack veniremen on two subjects: (1) the manner of execution and (2) the minimum punishment allowed by state law. The last time this case was here, I refuted Miller-El's claim that the prosecutors' disparate questioning evinced racial bias, and explained why it did not even entitle him to a certificate of appealability. *Miller-El I*, 537 U. S., at 363–370 (dissenting opinion).

This time, the majority has shifted gears, claiming that a different set of jurors demonstrates the State's racial bias. The majority's new claim is just as flawed as its last. The State questioned panelists differently when their questionnaire responses indicated ambivalence about the death penalty. Any racial disparity in questioning resulted from the

reality that more nonblack veniremen favored the death penalty and were willing to impose it.

1

While most veniremen were given a generic description of the death penalty at the outset of their *voir dire* examinations, some were questioned with a "graphic script" that detailed Texas' method of execution. *Ante*, at 255. According to Miller-El and the majority, prosecutors used the graphic script to create cause for removing black veniremen who were ambivalent about or opposed to the death penalty. *Ante*, at 260. This is incorrect.

The jury questionnaires asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?" It offered panelists the chance to circle "yes" or "no," and then asked them to "[p]lease explain your answer" in the provided space. *E. g.*, Joint Lodging 6. Question 58 asked, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" and offered panelists only the chance to circle "yes" or "no." *Ibid.*

According to the State, those veniremen who took a consistent stand on the death penalty—either for or against it—did not receive the graphic script. These prospective jurors either answered "no" to question 56 and "yes" to question 58 (meaning they did not believe in the death penalty and had qualms about imposing it), or answered "yes" to question 56 and "no" to question 58 (meaning they did believe in the death penalty and had no qualms about imposing it). Only those potential jurors who answered inconsistently, thereby indicating ambivalence about the death penalty, received the graphic script.

The questionnaires bear out this distinction. Fifteen blacks were questioned during *voir dire*. Only eight of them—or 53%—received the graphic script. All eight had

given ambivalent questionnaire answers regarding their ability to impose the death penalty. There is no question that veniremen Baker, Bailey, Boggess, Woods, and Butler were ambivalent in their questionnaire answers. See *ante*, at 260, n. 27; 4 Record 1874–1875.[5] The majority claims that Keaton, Kennedy, and Mackey were not ambivalent, *ante*, at 258–259, and nn. 17, 19, but their questionnaire answers show otherwise. For instance, Keaton circled "no" for question 56, indicating she did not believe in the death penalty, and wrote, "It's not for me to punished *[sic]* anyone." Joint Lodging 55. However, she then circled "no" for question 58, indicating that she had no qualms about imposing the death penalty. *Ibid.* Likewise, Mackey indicated she did not believe in the death penalty and wrote "Thou Shall Not Kill" in the explanation space. *Id.*, at 79. Mackey then said that she had no qualms, religious or otherwise, about imposing the death penalty, even though she had just quoted one of the Ten Commandments. *Ibid.* Keaton's and Mackey's answers cannot be reconciled, and the majority makes no attempt to do so. *Ante*, at 258, n. 17. Kennedy wrote on his questionnaire that he would impose the death penalty "[o]nly in extreme cases, such as multiple murders." Joint Lodging 46. This left prosecutors uncertain about whether Kennedy could impose the death penalty on Miller-El, who had murdered only one person (though he had paralyzed another).

Of the seven blacks who did not receive the graphic script, six took a stand on the death penalty—either for or against it—in their questionnaires. There was no need to use the graphic script to clarify their positions. Veniremen Boze-

[5] The majority's own recitation of the *voir dire* transcript captures Butler's ambivalence. *Ante*, at 258–259, n. 19. Butler said both that she had no qualms about imposing the death penalty, 4 Record 1906–1907, and that she would impose the death penalty "only when a crime has been committed concerning a child such as beating to death or some form of harsh physical abuse and when an innocent victim's life is taken," *id.*, at 1874.

man, Fields, Rand, and Warren all answered "yes" to question 56 (indicating that they believed in the death penalty) and "no" to question 58 (indicating that they had no qualms about imposing it).[6] *Id.*, at 6 (Bozeman); *id.*, at 14 (Fields); *id.*, at 30 (Rand); *id.*, at 22 (Warren). Venireman Mosley was the opposite: He said that he was opposed to the death penalty, 7 Record 2656, 2681, and that he definitely could not impose it, *id.*, at 2669–2670. The same appears true of venireman Smith, 2 *id.*, at 927–928, who was so adamantly opposed to the death penalty throughout her *voir dire* that she was struck for cause, *id.*, at 1006. The only apparent exception is venireman Carter. She said that she believed in the death penalty, but wrote on the questionnaire, "Yes and no. It would depend on what the person had done." 4 *id.*, at 1993 (internal quotation marks omitted). She then answered "'[y]es'" to question 58, indicating that she had some difficulties with imposing the death penalty. *Ibid.* Despite her ambivalence, Carter did not receive the full graphic script. Prosecutors told her only that Miller-El "[would] be executed by lethal injection at Huntsville." *Id.*, at 1952.

Thus far, the State's explanation for its use of the graphic script fares far better than Miller-El's or the majority's. Questionnaire answers explain prosecutors' use of the graphic script with 14 out of the 15 blacks, or 93%. By contrast, race explains use of the script with only 8 out of 15 veniremen, or 53%. The majority's more nuanced explanation is likewise inferior to the State's. It hypothesizes that the script was used to remove only those black veniremen ambivalent about *or* opposed to the death penalty. *Ante*, at 260. But that explanation accounts for only 12 out of 15 veniremen, or 80%. The majority cannot explain why prosecutors did not use the script on Mosley and Smith, who were opposed to the death penalty, or Carter, who was ambivalent.

---

[6] The State's concerns with Fields and Warren stemmed not from their questionnaire responses, but from their subsequent *voir dire* testimony. *Supra*, at 288, 293.

Because the majority does not account for veniremen like Carter, and also mischaracterizes veniremen like Keaton, Kennedy, and Mackey, it arrives at different percentages. This is not clear and convincing evidence of racial bias.

The State's explanation also accounts for its treatment of the 12 nonblack veniremen (10 whites, 1 Hispanic, and 1 Filipino) on whom the majority relies. Granted, it is more difficult to draw conclusions about these nonblack veniremen. With the blacks, 11 of their 15 questionnaires are available; with the nonblacks, that number plummets to 3 of 12, because those veniremen were not discussed before the state court. See *supra*, at 279. Nevertheless, the questionnaires and *voir dire* permit some tentative conclusions.

First, of the five nonblacks who received the graphic script—Desinise, Evans, Gutierrez, Sztybel, and Zablan—four were ambivalent. On his questionnaire, Gutierrez answered both that he believed in the death penalty and that he had qualms about imposing it. Joint Lodging 231. Sztybel and Zablan averred that they believed in the death penalty and could impose it, but their written answers to question 56 made it unclear under what circumstances they could vote to impose the death penalty.[7] Desinise is a closer call, but he was genuinely undecided about his ability to impose the death penalty, and the parties struck him by agreement. 3 Record 1505–1506, 1509, 1511, 1514. Of the five nonblacks who received the graphic script, Evans was the only one steadfastly opposed to the death penalty. 6 *id.*, at 2588–2589, 2591, 2595.

Of the seven nonblacks who allegedly did not receive the graphic script, four were strongly opposed to the death penalty. See *Miller-El I*, 537 U. S., at 364–365 (THOMAS, J., dis-

[7] Joint Lodging 184 (Sztybel) ("If a person is found guilty of murder or other crime, which they have taken someone else's life, without a valid defense. They may continue to do this again and again. Even if they are sentenced to jail when they are released this could keep happening"); *id.*, at 223 (Zablan) ("If it's the law and if the crime fits such punishment").

senting). Berk, Hinson, and Nelson were so opposed that they were struck for cause, and Holtz was struck by the State because he was opposed unless a policeman or fireman was murdered. *Ibid.* Administering the graphic script to these potential jurors would have been useless. "No trial lawyer would willingly antagonize a potential juror ardently opposed to the death penalty with an extreme portrait of its implementation." *Id.*, at 364.

Of the remaining three nonblacks, the majority is correct that Moses was ambivalent in her questionnaire responses, 3 Record 1140–1141, 1177, although it is not certain that Vickery was, 4 *id.*, at 1611. Neither received the graphic script. However, the final nonblack, Girard, confirms the State's explanation. It was not clear from Girard's questionnaire whether she was ambivalent.[8] On the stand, prosecutor Nelson started off with the abstract script. 6 *id.*, at 2520–2521. But it quickly became apparent that Girard was "just not real sure" about her ability to impose the death penalty, and she testified that she had not decided its value as a form of punishment. *Id.*, at 2522–2523. At that point, Nelson gave her the graphic script—for no other reason than to discern her basic reaction. *Id.*, at 2524–2525. Not only did it succeed—Girard testified that she did not want to serve on a capital jury, *id.*, at 2529, 2531—but Miller-El's attorney also used the graphic script when he questioned Girard, *id.*, at 2553. Miller-El's counsel was using the graphic script just as the State was: to discern a potential juror's true feelings, not to create cause for removing a venireman. After all, Girard's views were favorable to Miller-El.

In any event, again the State's explanation fares well. The State's explanation accounts for prosecutors' choice between the abstract and graphic scripts for 9 of 12 nonblack

---

[8] Girard did not answer question 56 about her belief in the death penalty, 6 Record 2522, but she indicated in answer to question 58 that her personal beliefs would not prevent her from imposing the death penalty, *id.*, at 2555–2556.

veniremen, or 75%. Moses and Vickery were likely ambivalent but did not receive the graphic script, while Evans was opposed to the death penalty but did receive it. However, the majority's theory accounts for the State's treatment of only 6 of 12 nonblacks, or 50%. The majority can explain why jurors like Moses and Vickery did not receive the graphic script, because it believes the State was using the graphic script primarily with *blacks* opposed to or ambivalent about the death penalty. *Ante*, at 260. But the majority cannot explain the State's use of the script with an opposed nonblack like Evans, or ambivalent nonblacks like Desinise, Girard, Gutierrez, Sztybel, and Zablan.

Finally, the majority cannot take refuge in any supposed disparity between use of the graphic script with ambivalent black and nonblack veniremen. *Ante*, at 257–259. The State gave the graphic script to 8 of 9 ambivalent blacks, or 88%, and 5 of 7 ambivalent nonblacks, or 71%. This is hardly much of a difference. However, when the majority lumps in veniremen opposed to the death penalty, *ibid.*, the disparity increases. The State gave the graphic script to 8 of 11 ambivalent or opposed blacks, or 73%, and 6 of 12 ambivalent or opposed nonblacks, or 50%. But the reason for the increased disparity is not race: It is, as the State maintains, that veniremen who were opposed to the death penalty did not receive the graphic script.

In sum, the State can explain its treatment of 23 of 27 potential jurors, or 85%, while the majority can only account for the State's treatment of 18 of 27 potential jurors, or 67%. This is a far cry from clear and convincing evidence of racial bias.

2

Miller-El also alleges that the State employed two different scripts on the basis of race when asking questions about imposition of the minimum sentence. This disparate-questioning argument is even more flawed than the last one. The evidence confirms that, as the State argues, prosecutors

used different questioning on minimum sentences to create cause to strike veniremen who were ambivalent about or opposed to the death penalty. Brief for Respondent 33, and n. 26.

Of the 15 blacks, 7 were given the minimum punishment script (MPS). All had expressed ambivalence about the death penalty, either in their questionnaires (Baker, Boggess, and Kennedy) or during *voir dire* (Bozeman, Fields, Rand, and Warren).[9] Woods expressed ambivalence in his questionnaire, but his *voir dire* testimony made clear that he was a superb juror for the State. See *supra*, at 289–290. Thus, Woods did not receive the MPS. There was no reason to give the MPS to Butler, Carter, Mosley, or Smith, all of whom were dismissed for cause or by agreement of the parties. That leaves Bailey, Keaton, and Mackey, all of whom were so adamantly opposed to the death penalty during *voir dire* that the State attempted to remove them for cause. 11–(A) Record 4112, 4120, 4142 (Bailey); *id.*, at 4316 (Keaton); 10 *id.*, at 3950, 3953 (Mackey). Because the State believed that it already had grounds to strike these potential jurors, it did not need the MPS to disqualify them. However, even assuming that the State should have used the MPS on these 3 veniremen, the State's explanation still accounts for 7 of the 10 ambivalent blacks, or 70%.

The majority does not seriously contest any of this. *Ante*, at 261–262, and n. 34. Instead, it contends that the State used the MPS less often with nonblacks, which demonstrates that the MPS was a ruse to remove blacks. This is not true: The State used the MPS more often with ambivalent nonblacks who were not otherwise removable for cause or by agreement.

---

[9] In making the decision whether to employ the MPS, prosecutors could rely on both the questionnaires and substantial *voir dire* testimony, because the minimum punishment questioning occurred much later in the *voir dire* than questioning about the death penalty. *Miller-El I*, 537 U. S. 322, 369 (2003) (THOMAS, J., dissenting).

Of the nonblacks who reached the point in the *voir dire* sequence where the MPS was typically administered, the majority points to 11 whom it alleges were ambivalent and should have received the script. *Ante*, at 262, and n. 34. Three of these veniremen—Gibson, Gutierrez, and Holtz—were given the MPS, just like many of the blacks. Four of the remaining eight veniremen—Moses, Salsini, Vickery, and Witt—were favorable enough to the State that Miller-El peremptorily struck them.[10] The State had no interest in disqualifying these jurors. Two of the remaining four veniremen—Hearn and Mazza—indicated that they could impose the death penalty, both on their questionnaires and during *voir dire*. The State likewise had no interest in disqualifying these jurors. Assuming that the State should have used the MPS on the two remaining veniremen, Crowson and Whaley, the State's explanation still accounts for 9 of the 11 ambivalent nonblacks, or 81%. Miller-El's evidence is not even minimally persuasive, much less clear and convincing.

C

Miller-El's argument that prosecutors shuffled the jury to remove blacks is pure speculation. At the *Batson* hearing, Miller-El did not raise, nor was there any discussion of, the topic of jury shuffling as a racial tactic. The record shows only that the State shuffled the jury during the first three weeks of jury selection, while Miller-El shuffled the jury during each of the five weeks. This evidence no more proves that prosecutors sought to eliminate blacks from the jury, than it proves that Miller-El sought to eliminate whites even more often. *Miller-El I*, 537 U. S., at 360 (THOMAS, J., dissenting).

---

[10] Moses gave ambivalent answers on her questionnaire, as perhaps did Vickery. *Supra*, at 302. However, Moses and Vickery indicated during their *voir dire* testimony that they could impose the death penalty, 3 Record 1139–1141; 4 *id.*, at 1576–1579, and thus they were not questioned on minimum sentences. But see *ante*, at 263, n. 36.

Miller-El notes that the State twice shuffled the jury (in the second and third weeks) when a number of blacks were seated at the front of the panel. *Ante*, at 254. According to the majority, this gives rise to an "inference" that prosecutors were discriminating. *Ante*, at 255. But Miller-El should not be asking this Court to draw "inference[s]"; he should be asking it to examine clear and convincing proof. And the inference is not even a strong one. We do not know if the nonblacks near the front shared characteristics with the blacks near the front, providing race-neutral reasons for the shuffles. We also do not know the racial composition of the panel during the first week when the State shuffled, or during the fourth and fifth weeks when it did not.

More importantly, any number of characteristics other than race could have been apparent to prosecutors from a visual inspection of the jury panel. See *Ladd* v. *State*, 3 S. W. 3d 547, 563–564 (Tex. Crim. App. 1999). Granted, we do not know whether prosecutors relied on racially neutral reasons, *ante*, at 254–255, but that is because Miller-El never asked at the *Batson* hearing. It is Miller-El's burden to prove racial discrimination, and the jury-shuffle evidence itself does not provide such proof.

D

The majority's speculation would not be complete, however, without its discussion (block-quoted from *Miller-El I*) of the history of discrimination in the D. A.'s Office. This is nothing more than guilt by association that is unsupported by the record. Some of the witnesses at the *Swain* hearing did testify that individual prosecutors had discriminated. *Ante*, at 264. However, no one testified that the prosecutors in Miller-El's trial—Norman Kinne, Paul Macaluso, and Jim Nelson—had ever been among those to engage in racially discriminatory jury selection. *Supra*, at 276.

The majority then tars prosecutors with a manual entitled Jury Selection in a Criminal Case (hereinafter Manual or

Sparling Manual), authored by John Sparling, a former Dallas County prosecutor. There is no evidence, however, that Kinne, Macaluso, or Nelson had ever read the Manual—which was written in 1968, almost two decades before Miller-El's trial.[11] The reason there is no evidence on the question is that Miller-El never asked. During the entire *Batson* hearing, there is no mention of the Sparling Manual. Miller-El never questioned Macaluso about it, and he never questioned Kinne or Nelson at all. The majority simply assumes that all Dallas County prosecutors were racist and remained that way through the mid-1980's.

Nor does the majority rely on the Manual for anything more than show. The Manual contains a single, admittedly stereotypical line on race: "Minority races almost always empathize with the Defendant." App. 102. Yet the Manual also tells prosecutors not to select "anyone who had a close friend or relative that was prosecuted by the State." *Id.*, at 112. That was true of both Warren and Fields, and yet the majority cavalierly dismisses as "makeweight" the State's justification that Warren and Fields were struck because they were related to individuals convicted of crimes. *Ante*, at 246, 250, n. 8. If the Manual is to be attributed to Kinne, Macaluso, and Nelson, then it ought to be attributed in its entirety. But if the majority did that, then it could not point to any black venireman who was even arguably dismissed on account of race.

Finally, the majority notes that prosecutors "'marked the race of each prospective juror on their juror cards.'" *Ante*, at 264 (quoting *Miller-El I*, *supra*, at 347). This suffers from the same problems as Miller-El's other evidence. Prosecutors did mark the juror cards with the jurors' race, sex, and juror number. We have no idea—and even the majority cannot bring itself to speculate—whether this was

[11] Judge Larry Baraka, one of the first black prosecutors to serve in the D. A.'s Office, testified that, to the best of his recollection, the Manual was no longer used in 1977 when he attended the training course. App. 844.

done merely for identification purposes or for some more nefarious reason. The reason we have no idea is that the juror cards were never introduced before the state courts, and thus prosecutors were never questioned about their use of them.

* * *

Thomas Joe Miller-El's charges of racism have swayed the Court, and AEDPA's restrictions will not stand in its way. But Miller-El has not established, much less established by clear and convincing evidence, that prosecutors racially discriminated in the selection of his jury—and he certainly has not done so on the basis of the evidence presented to the Texas courts. On the basis of facts and law, rather than sentiments, Miller-El does not merit the writ. I respectfully dissent.

Syllabus

GRABLE & SONS METAL PRODUCTS, INC. *v.* DARUE ENGINEERING & MANUFACTURING

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–603. Argued April 18, 2005—Decided June 13, 2005

The Internal Revenue Service seized real property owned by petitioner (hereinafter Grable) to satisfy a federal tax delinquency, and gave Grable notice by certified mail before selling the property to respondent (hereinafter Darue). Grable subsequently brought a quiet title action in state court, claiming that Darue's title was invalid because 26 U. S. C. § 6335 required the IRS to give Grable notice of the sale by personal service, not certified mail. Darue removed the case to Federal District Court as presenting a federal question because the title claim depended on an interpretation of federal tax law. The District Court declined to remand the case, finding that it posed a significant federal-law question, and it granted Darue summary judgment on the merits. The Sixth Circuit affirmed, and this Court granted certiorari on the jurisdictional question.

Held: The national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal-question jurisdiction over the disputed issue on removal. Pp. 312–320.

(a) Darue was entitled to remove the quiet title action if Grable could have brought it in federal court originally, as a civil action "arising under the . . . laws . . . of the United States," 28 U. S. C. § 1331. Federal-question jurisdiction is usually invoked by plaintiffs pleading a cause of action created by federal law, but this Court has also long recognized that such jurisdiction will lie over some state-law claims that implicate significant federal issues, see, *e. g.*, *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180. Such federal jurisdiction demands not only a contested federal issue, but a substantial one. And the jurisdiction must be consistent with congressional judgment about the sound division of labor between state and federal courts governing § 1331's application. These considerations have kept the Court from adopting a single test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties. Instead, the question is whether the state-law claim necessarily stated a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing a congressionally approved balance of federal and state judicial responsibilities. Pp. 312–314.

Syllabus

(b) This case warrants federal jurisdiction. Grable premised its superior title claim on the IRS's failure to give adequate notice, as defined by federal law. Whether Grable received notice is an essential element of its quiet title claim, and the federal statute's meaning is actually disputed. The meaning of a federal tax provision is an important federal-law issue that belongs in federal court. The Government has a strong interest in promptly collecting delinquent taxes, and the IRS's ability to satisfy its claims from delinquents' property requires clear terms of notice to assure buyers like Darue that the IRS has good title. Finally, because it will be the rare state title case that raises a federal-law issue, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor. This conclusion puts the Court in venerable company, quiet title actions having been the subject of some of the earliest exercises of federal-question jurisdiction over state-law claims. *E. g.*, *Hopkins* v. *Walker*, 244 U. S. 486, 490–491. Pp. 314–316.

(c) *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, is not to the contrary. There, in finding federal jurisdiction unavailable for a state tort claim resting in part on an allegation that the defendant drug company had violated a federal branding law, the Court noted that Congress had not provided a private federal cause of action for such violations. *Merrell Dow* cannot be read to make a federal cause of action a necessary condition for federal-question jurisdiction. It disclaimed the adoption of any bright-line rule and expressly approved the exercise of jurisdiction in *Smith*, where there was no federal cause of action. Accordingly, *Merrell Dow* should be read in its entirety as treating the absence of such cause as evidence relevant to, but not dispositive of, the "sensitive judgments about congressional intent" required by § 1331. *Id.*, at 810. In *Merrell Dow*, the principal significance of this absence was its bearing on the consequences to the federal system. If the federal labeling standard without a cause of action could get a state claim into federal court, so could any other federal standards without causes of action. And that would mean an enormous number of cases. A comparable analysis yields a different jurisdictional conclusion here, because state quiet title actions rarely involve contested federal-law issues. Pp. 316–320.

377 F. 3d 592, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 320.

Eric H. Zagrans argued the cause for petitioner. On the briefs was *Charles E. McFarland.*

Michael C. Walton argued the cause for respondent. With him on the brief were *John M. Lichtenberg, Gregory G. Timmer,* and *Mary L. Tabin.*

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General O'Connor, Deputy Solicitor General Hungar,* and *Gilbert S. Rothenberg.**

JUSTICE SOUTER delivered the opinion of the Court.

The question is whether want of a federal cause of action to try claims of title to land obtained at a federal tax sale precludes removal to federal court of a state action with nondiverse parties raising a disputed issue of federal title law. We answer no, and hold that the national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal-question jurisdiction over the disputed issue on removal, which would not distort any division of labor between the state and federal courts, provided or assumed by Congress.

I

In 1994, the Internal Revenue Service seized Michigan real property belonging to petitioner Grable & Sons Metal Products, Inc., to satisfy Grable's federal tax delinquency. Title 26 U. S. C. § 6335 required the IRS to give notice of the seizure, and there is no dispute that Grable received actual notice by certified mail before the IRS sold the property to respondent Darue Engineering & Manufacturing. Although Grable also received notice of the sale itself, it did not exercise its statutory right to redeem the property within 180 days of the sale, § 6337(b)(1), and after that period

**Mr. Zagrans* filed a brief for Jerome R. Mikulski et ux. as *amici curiae* urging reversal.

had passed, the Government gave Darue a quitclaim deed, § 6339.

Five years later, Grable brought a quiet title action in state court, claiming that Darue's record title was invalid because the IRS had failed to notify Grable of its seizure of the property in the exact manner required by § 6335(a), which provides that written notice must be "given by the Secretary to the owner of the property [or] left at his usual place of abode or business." Grable said that the statute required personal service, not service by certified mail.

Darue removed the case to Federal District Court as presenting a federal question, because the claim of title depended on the interpretation of the notice statute in the federal tax law. The District Court declined to remand the case at Grable's behest after finding that the "claim does pose a 'significant question of federal law,'" Tr. 17 (Apr. 2, 2001), and ruling that Grable's lack of a federal right of action to enforce its claim against Darue did not bar the exercise of federal jurisdiction. On the merits, the court granted summary judgment to Darue, holding that although § 6335 by its terms required personal service, substantial compliance with the statute was enough. 207 F. Supp. 2d 694 (WD Mich. 2002).

The Court of Appeals for the Sixth Circuit affirmed. 377 F. 3d 592 (2004). On the jurisdictional question, the panel thought it sufficed that the title claim raised an issue of federal law that had to be resolved, and implicated a substantial federal interest (in construing federal tax law). The court went on to affirm the District Court's judgment on the merits. We granted certiorari on the jurisdictional question alone,[1] 543 U. S. 1042 (2005), to resolve a split within the Courts of Appeals on whether *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804 (1986), always requires

[1] Accordingly, we have no occasion to pass upon the proper interpretation of the federal tax provision at issue here.

a federal cause of action as a condition for exercising federal-question jurisdiction.[2] We now affirm.

II

Darue was entitled to remove the quiet title action if Grable could have brought it in federal district court originally, 28 U. S. C. § 1441(a), as a civil action "arising under the Constitution, laws, or treaties of the United States," § 1331. This provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law (*e. g.*, claims under 42 U. S. C. § 1983). There is, however, another longstanding, if less frequently encountered, variety of federal "arising under" jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues. *E. g., Hopkins* v. *Walker*, 244 U. S. 486, 490–491 (1917). The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues, see ALI, Study of the Division of Jurisdiction Between State and Federal Courts 164–166 (1968).

The classic example is *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921), a suit by a shareholder claiming that the defendant corporation could not lawfully buy certain bonds of the National Government because their issuance was unconstitutional. Although Missouri law provided the cause of action, the Court recognized federal-question jurisdiction because the principal issue in the case was the federal constitutionality of the bond issue. *Smith* thus held, in a

[2] Compare *Seinfeld* v. *Austen*, 39 F. 3d 761, 764 (CA7 1994) (finding that federal-question jurisdiction over a state-law claim requires a parallel federal private right of action), with *Ormet Corp.* v. *Ohio Power Co.*, 98 F. 3d 799, 806 (CA4 1996) (finding that a federal private action is not required).

somewhat generous statement of the scope of the doctrine, that a state-law claim could give rise to federal-question jurisdiction so long as it "appears from the [complaint] that the right to relief depends upon the construction or application of [federal law]." *Id.*, at 199.

The *Smith* statement has been subject to some trimming to fit earlier and later cases recognizing the vitality of the basic doctrine, but shying away from the expansive view that mere need to apply federal law in a state-law claim will suffice to open the "arising under" door. As early as 1912, this Court had confined federal-question jurisdiction over state-law claims to those that "really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." *Shulthis* v. *McDougal*, 225 U. S. 561, 569. This limitation was the ancestor of Justice Cardozo's later explanation that a request to exercise federal-question jurisdiction over a state action calls for a "common-sense accommodation of judgment to [the] kaleidoscopic situations" that present a federal issue, in "a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 117–118 (1936). It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum. *E. g.*, *Chicago* v. *International College of Surgeons*, 522 U. S. 156, 164 (1997); *Merrell Dow*, *supra*, at 814, and n. 12; *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 28 (1983).

But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts gov-

erning the application of § 1331. Thus, *Franchise Tax Bd.* explained that the appropriateness of a federal forum to hear an embedded issue could be evaluated only after considering the "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id.*, at 8. Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction. See also *Merrell Dow*, 478 U. S., at 810.

These considerations have kept us from stating a "single, precise, all-embracing" test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties. *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 821 (1988) (STEVENS, J., concurring). We have not kept them out simply because they appeared in state raiment, as Justice Holmes would have done, see *Smith*, *supra*, at 214 (dissenting opinion), but neither have we treated "federal issue" as a password opening federal courts to any state action embracing a point of federal law. Instead, the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

III

A

This case warrants federal jurisdiction. Grable's state complaint must specify "the facts establishing the superiority of [its] claim," Mich. Ct. Rule 3.411(B)(2)(c) (West 2005), and Grable has premised its superior title claim on a failure by the IRS to give it adequate notice, as defined by federal

law. Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case. The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court. The Government has a strong interest in the "prompt and certain collection of delinquent taxes," *United States* v. *Rodgers*, 461 U. S. 677, 709 (1983), and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like Darue to satisfy themselves that the Service has touched the bases necessary for good title. The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters. Finally, because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor. See n. 3, *infra*.

This conclusion puts us in venerable company, quiet title actions having been the subject of some of the earliest exercises of federal-question jurisdiction over state-law claims. In *Hopkins*, 244 U. S., at 490–491, the question was federal jurisdiction over a quiet title action based on the plaintiffs' allegation that federal mining law gave them the superior claim. Just as in this case, "the facts showing the plaintiffs' title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiffs' cause of action."[3] *Id.*, at

[3]The quiet title cases also show the limiting effect of the requirement that the federal issue in a state-law claim must actually be in dispute to justify federal-question jurisdiction. In *Shulthis* v. *McDougal*, 225 U. S. 561 (1912), this Court found that there was no federal-question jurisdiction

490. As in this case again, "it is plain that a controversy respecting the construction and effect of the [federal] laws is involved and is sufficiently real and substantial." *Id.*, at 489. This Court therefore upheld federal jurisdiction in *Hopkins*, as well as in the similar quiet title matters of *Northern Pacific R. Co.* v. *Soderberg*, 188 U. S. 526, 528 (1903), and *Wilson Cypress Co.* v. *Del Pozo y Marcos*, 236 U. S. 635, 643–644 (1915). Consistent with those cases, the recognition of federal jurisdiction is in order here.

B

Merrell Dow Pharmaceuticals Inc. v. *Thompson*, 478 U. S. 804 (1986), on which Grable rests its position, is not to the contrary. *Merrell Dow* considered a state tort claim resting in part on the allegation that the defendant drug company had violated a federal misbranding prohibition, and was thus presumptively negligent under Ohio law. *Id.*, at 806. The Court assumed that federal law would have to be applied to resolve the claim, but after closely examining the strength of the federal interest at stake and the implications of opening the federal forum, held federal jurisdiction unavailable. Congress had not provided a private federal cause of action for violation of the federal branding requirement, and the Court found "it would . . . flout, or at least undermine, congressional intent to conclude that federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation . . . is said to be a . . . 'proximate cause' under state law." *Id.*, at 812.

---

to hear a plaintiff's quiet title claim in part because the federal statutes on which title depended were not subject to "any controversy respecting their validity, construction, or effect." *Id.*, at 570. As the Court put it, the requirement of an actual dispute about federal law was "especially" important in "suit[s] involving rights to land acquired under a law of the United States," because otherwise "every suit to establish title to land in the central and western states would so arise [under federal law], as all titles in those States are traceable back to those laws." *Id.*, at 569–570.

Because federal law provides for no quiet title action that could be brought against Darue,[4] Grable argues that there can be no federal jurisdiction here, stressing some broad language in *Merrell Dow* (including the passage just quoted) that on its face supports Grable's position, see Note, Mr. *Smith* Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow*, 115 Harv. L. Rev. 2272, 2280–2282 (2002) (discussing split in Courts of Appeals over private right of action requirement after *Merrell Dow*). But an opinion is to be read as a whole, and *Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith*, see *supra*, at 314, and converting a federal cause of action from a sufficient condition for federal-question jurisdiction[5] into a necessary one.

In the first place, *Merrell Dow* disclaimed the adoption of any bright-line rule, as when the Court reiterated that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." 478 U. S., at 810. The opinion included a lengthy footnote explaining that questions of jurisdiction over state-law claims require "careful judgments," *id.*, at 814, about the "nature of the federal interest at stake," *id.*, at 814, n. 12 (emphasis deleted). And as a final indication that it did not mean to make a federal right of action mandatory, it expressly approved the exercise of jurisdiction sustained in *Smith*, despite the want of any federal cause of action available to *Smith*'s shareholder plaintiff. 478 U. S., at 814, n. 12.

---

[4] Federal law does provide a quiet title cause of action against the Federal Government. 28 U. S. C. § 2410. That right of action is not relevant here, however, because the Federal Government no longer has any interest in the property, having transferred its interest to Darue through the quitclaim deed.

[5] For an extremely rare exception to the sufficiency of a federal right of action, see *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507 (1900).

Merrell Dow then, did not toss out, but specifically retained, the contextual enquiry that had been *Smith*'s hallmark for over 60 years. At the end of *Merrell Dow*, Justice Holmes was still dissenting.

Accordingly, *Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the "sensitive judgments about congressional intent" that § 1331 requires. The absence of any federal cause of action affected *Merrell Dow*'s result two ways. The Court saw the fact as worth some consideration in the assessment of substantiality. But its primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues. For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.

One only needed to consider the treatment of federal violations generally in garden variety state tort law. "The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings."[6] Re-

[6] Other jurisdictions treat a violation of a federal statute as evidence of negligence or, like Ohio itself in *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804 (1986), as creating a rebuttable presumption of negligence. Restatement § 14, Reporters' Note, Comment *c*, at 196. Either approach could still implicate issues of federal law.

statement (Third) of Torts § 14, Reporters' Note, Comment *a*, p. 195 (Tent. Draft No. 1, Mar. 28, 2001). See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 36, p. 221, n. 9 (5th ed. 1984) ("[T]he breach of a federal statute may support a negligence per se claim as a matter of state law" (collecting authority)). A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts. Expressing concern over the "increased volume of federal litigation," and noting the importance of adhering to "legislative intent," *Merrell Dow* thought it improbable that the Congress, having made no provision for a federal cause of action, would have meant to welcome any state-law tort case implicating federal law "solely because the violation of the federal statute is said to [create] a rebuttable presumption [of negligence] . . . under state law." 478 U. S., at 811–812 (internal quotation marks omitted). In this situation, no welcome mat meant keep out. *Merrell Dow*'s analysis thus fits within the framework of examining the importance of having a federal forum for the issue, and the consistency of such a forum with Congress's intended division of labor between state and federal courts.

As already indicated, however, a comparable analysis yields a different jurisdictional conclusion in this case. Although Congress also indicated ambivalence in this case by providing no private right of action to Grable, it is the rare state quiet title action that involves contested issues of federal law, see n. 3, *supra*. Consequently, jurisdiction over actions like Grable's would not materially affect, or threaten to affect, the normal currents of litigation. Given the absence of threatening structural consequences and the clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum, there is no good reason to

shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.[7]

IV

The judgment of the Court of Appeals, upholding federal jurisdiction over Grable's quiet title action, is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

The Court faithfully applies our precedents interpreting 28 U. S. C. § 1331 to authorize federal-court jurisdiction over some cases in which state law creates the cause of action but requires determination of an issue of federal law, *e. g.*, *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921); *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804 (1986). In this case, no one has asked us to overrule those precedents and adopt the rule Justice Holmes set forth in *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257 (1916), limiting § 1331 jurisdiction to cases in which federal law creates the cause of action pleaded on the face of the plaintiff's complaint. *Id.*, at 260. In an appropriate case, and perhaps with the benefit of better evidence as to the original meaning of § 1331's text, I would be willing to consider that course.*

---

[7] At oral argument Grable's counsel espoused the position that after *Merrell Dow*, federal-question jurisdiction over state-law claims absent a federal right of action could be recognized only where a constitutional issue was at stake. There is, however, no reason in text or otherwise to draw such a rough line. As *Merrell Dow* itself suggested, constitutional questions may be the more likely ones to reach the level of substantiality that can justify federal jurisdiction. 478 U. S., at 814, n. 12. But a flat ban on statutory questions would mechanically exclude significant questions of federal law like the one this case presents.

*This Court has long construed the scope of the statutory grant of federal-question jurisdiction more narrowly than the scope of the constitutional grant of such jurisdiction. See *Merrell Dow Pharmaceuticals*

Jurisdictional rules should be clear. Whatever the virtues of the *Smith* standard, it is anything but clear. *Ante*, at 313 (the standard "calls for a 'common-sense accommodation of judgment to [the] kaleidoscopic situations' that present a federal issue, in 'a selective process which picks the substantial causes out of the web and lays the other ones aside'" (quoting *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 117–118 (1936))); *ante*, at 314 ("[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities"); *ante*, at 317, 318 ("'[D]eterminations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system'"; "the absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires" (quoting *Merrell Dow*, *supra*, at 810)).

Whatever the vices of the *American Well Works* rule, it is clear. Moreover, it accounts for the "'vast majority'" of cases that come within § 1331 under our current case law, *Merrell Dow*, *supra*, at 808 (quoting *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 9 (1983))—further indication that trying to sort out which cases fall within the smaller *Smith* category may not be worth the effort it entails. See R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal

---

Inc. v. *Thompson*, 478 U. S. 804, 807–808 (1986). I assume for present purposes that this distinction is proper—that is, that the language of 28 U. S. C. § 1331, "[t]he district courts shall have original jurisdiction of all *civil actions arising under* the Constitution, laws, or treaties of the United States" (emphasis added), is narrower than the language of Art. III, § 2, cl. 1, of the Constitution, "[t]he judicial Power shall extend to all *Cases*, in Law and Equity, *arising under* this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . " (emphasis added).

Courts and the Federal System 885–886 (5th ed. 2003). Accordingly, I would be willing in appropriate circumstances to reconsider our interpretation of § 1331.

Syllabus

SAN REMO HOTEL, L. P., ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–340. Argued March 28, 2005—Decided June 20, 2005

Petitioners, hoteliers in respondent city, initiated this litigation over the application of an ordinance requiring them to pay a $567,000 fee for converting residential rooms to tourist rooms. They initially sought mandamus in California state court, but that action was stayed when they filed suit in Federal District Court asserting, *inter alia*, facial and as-applied challenges to the ordinance under the Fifth Amendment's Takings Clause. Although the District Court granted the city summary judgment, the Ninth Circuit abstained from ruling on the facial challenge under *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, because the pending state mandamus action could moot the federal question. The court did, however, affirm the District Court's ruling that the as-applied claim was unripe. Back in state court, petitioners attempted to reserve the right to return to federal court for adjudication of their federal takings claims. Ultimately, the California courts rejected petitioners' various state-law takings claims, and they returned to the Federal District Court, advancing a series of federal takings claims that depended on issues identical to those previously resolved in the state courts. In order to avoid being barred from suit by the general rule of issue preclusion, petitioners asked the District Court to exempt their federal takings claims from the reach of the full faith and credit statute, 28 U. S. C. § 1738. Relying on the *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 195, holding that takings claims are not ripe until a State fails "to provide adequate compensation for the taking," petitioners argued that, unless courts disregard § 1738 in takings cases, plaintiffs will be forced to litigate their claims in state court without any realistic possibility of ever obtaining federal review. Holding, *inter alia*, that petitioners' facial attack was barred by issue preclusion, the District Court reasoned that § 1738 requires federal courts to give preclusive effect to any state-court judgment that would have such effect under the State's laws. The court added that because California courts had interpreted the relevant substantive state takings law coextensively with federal law, petitioners' federal claims constituted the same claims the state courts had already resolved. Affirming, the Ninth Circuit rejected

petitioners' contention that general preclusion principles should be cast aside whenever plaintiffs must litigate in state court under *Pullman* and/or *Williamson County*.

Held: This Court will not create an exception to the full faith and credit statute in order to provide a federal forum for litigants seeking to advance federal takings claims. Pp. 336–348.

(a) The Court rejects petitioners' contention that whenever plaintiffs reserve their federal takings claims in state court under *England* v. *Louisiana Bd. of Medical Examiners*, 375 U. S. 411, federal courts should review the reserved federal claims *de novo*, regardless of what issues the state court may have decided or how it may have decided them. The *England* Court's discussion of the "typical case" in which reservations of federal issues are appropriate makes clear that the decision was aimed at cases fundamentally distinct from petitioners'. *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner. *Id.*, at 420. In such cases, the purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question, but to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy. See *id.*, at 416–417, and n. 7. Additionally, the Court made clear that the effective reservation of a federal claim was dependent on the condition that plaintiffs take no action to broaden the scope of the state court's review beyond deciding the antecedent state-law issue. *Id.*, at 419. Because the Ninth Circuit invoked *Pullman* abstention after determining that a ripe federal question existed as to petitioners' facial takings challenge, they were entitled to insulate from preclusive effect that one federal issue while they returned to state court to resolve their mandamus petition. Petitioners, however, chose to advance broader issues than the limited ones in the mandamus petition, putting forth facial and as-applied takings challenges to the city ordinance in their state action. By doing so, they effectively asked the state court to resolve the same federal issue they had previously asked it to reserve. *England* does not support the exercise of any such right. Petitioners' as-applied takings claims fare no better. The Ninth Circuit found those claims unripe under *Williamson County*, and therefore affirmed their dismissal. They were never properly before the District Court, and there was no reason to expect that they could be relitigated in full if advanced in the state proceedings. Pp. 336–341.

(b) Federal courts are not free to disregard § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court. Peti-

Syllabus

tioners misplace their reliance on the Second Circuit's *Santini* decision, which held that parties who are forced to litigate their state-law takings claims in state court pursuant to *Williamson County* cannot be precluded from having those very claims resolved by a federal court. The *Santini* court's reasoning is unpersuasive for several reasons. First, both petitioners and *Santini* ultimately depend on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. This Court has repeatedly held to the contrary. See, *e. g.*, *Allen* v. *McCurry*, 449 U. S. 90, 103–104. Second, petitioners' argument assumes that courts may simply create exceptions to § 1738 wherever they deem them appropriate. However, this Court has held that no such exception will be recognized unless a later statute contains an express or implied partial repeal. *E. g.*, *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 468. Congress has not expressed any intent to exempt federal takings claims from § 1738. Third, petitioners have overstated *Williamson County*'s reach throughout this litigation. Because they were never required to ripen in state court their claim that the city ordinance was facially invalid for failure to substantially advance a legitimate state interest, see *Yee* v. *Escondido*, 503 U. S. 519, 534, they could have raised the heart of their facial takings challenges directly in federal court. With respect to those federal claims that did require ripening, petitioners are incorrect that *Williamson County* precludes state courts from hearing simultaneously a plaintiff's request for compensation under state law together with a claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Pp. 341–348.

364 F. 3d 1088, affirmed.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined, *post*, p. 348.

Paul F. Utrecht argued the cause for petitioners. With him on the briefs was *Andrew M. Zacks.*

Seth P. Waxman argued the cause for respondents. With him on the brief were *Andrew W. Schwartz, Fran M. Layton, Ellison Folk, Edward C. DuMont,* and *Therese M. Stewart.**

*Briefs of *amici curiae* urging reversal were filed for Defenders of Property Rights et al. by *Robert P. Parker, Nancie G. Marzulla, Roger J. Marzulla,* and *Michael E. Malamut;* for Equity Lifestyle Properties, Inc.,

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether federal courts may craft an exception to the full faith and credit statute, 28 U. S. C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment.

Petitioners, who own and operate a hotel in San Francisco, California (hereinafter City), initiated this litigation in response to the application of a city ordinance that required them to pay a $567,000 "conversion fee" in 1996. After the California courts rejected petitioners' various state-law takings claims, they advanced in the Federal District Court a series of federal takings claims that depended on issues identical to those that had previously been resolved in the state-

---

et al. by *Elliot L. Bien*, *Edith R. Matthai*, and *Steven S. Fleischman;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* and for Elizabeth J. Neumont et al. by *Eric Grant.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *Peter C. Harvey*, Attorney General of New Jersey, *Patrick DeAlmeida*, Assistant Attorney General, and *Brian Weeks*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *J. Joseph Curran, Jr.*, of Maryland, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *W. A. Drew Edmondson* of Oklahoma, and *Darrell V. McGraw, Jr.*, of West Virginia; for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Peter H. Lehner*, Chief Assistant Attorney General, *Gregory Klass*, Assistant Solicitor General, and *John J. Sipos* and *Susan L. Taylor*, Assistant Attorneys General, *Richard Blumenthal*, Attorney General of Connecticut, and *William H. Sorrell*, Attorney General of Vermont; for the Community Rights Counsel et al. by *Timothy J. Dowling;* for the Conference of Chief Justices by *John D. Echeverria;* and for the National Association of Counties et al. by *Richard Ruda* and *James I. Crowley.*

Briefs of *amici curiae* were filed for the National Association of Home Builders by *Kenneth B. Bley*, *Mary V. DiCrescenzo*, *Duane J. Desiderio*, and *Thomas J. Ward;* for the Pacific Legal Foundation et al. by *Meriem L. Hubbard* and *R. S. Radford;* for the Honorable Steve Chabot by *Timothy S. Hollister;* for Franklin P. Kottschade by *Michael M. Berger;* and for Evandro S. Santini et al. by *Everett E. Newton.*

court action. In order to avoid the bar of issue preclusion, petitioners asked the District Court to exempt from § 1738's reach claims brought under the Takings Clause of the Fifth Amendment.

Petitioners' argument is predicated on *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), which held that takings claims are not ripe until a State fails "to provide adequate compensation for the taking." *Id.*, at 195. Unless courts disregard § 1738 in takings cases, petitioners argue, plaintiffs will be forced to litigate their claims in state court without any realistic possibility of ever obtaining review in a federal forum. The Ninth Circuit's rejection of this argument conflicted with the Second Circuit's decision in *Santini* v. *Connecticut Hazardous Waste Management Serv.*, 342 F. 3d 118 (2003). We granted certiorari to resolve the conflict, 543 U. S. 1032 (2004),[1] and now affirm the judgment of the Ninth Circuit.

I

The San Remo Hotel is a three-story, 62-unit hotel in the Fisherman's Wharf neighborhood in San Francisco. In December 1906, shortly after the great earthquake and fire destroyed most of the City, the hotel—then called the "New California Hotel"—opened its doors to house dislocated individuals, immigrants, artists, and laborers. The City officially licensed the facility to operate as a hotel and restaurant in 1916, and in 1922 the hotel was given its current

---

[1] Although petitioners asked this Court to review two separate questions, our grant of certiorari was limited exclusively to the question whether "a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?" Pet. for Cert. i. Thus, we have no occasion to reach petitioners' claim that, under California law, the substantive state takings law decision of the California Supreme Court was not entitled to preclusive effect in federal court. See Brief for Petitioners 19–21.

name. When the hotel fell into financial difficulties and a "dilapidated condition" in the early 1970's, Robert and Thomas Field purchased the facility, restored it, and began to operate it as a bed and breakfast inn. See *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 100 Cal. Rptr. 2d 1, 5 (Cal. App. 2000) (officially depublished).

In 1979, San Francisco's Board of Supervisors responded to "a severe shortage" of affordable rental housing for elderly, disabled, and low-income persons by instituting a moratorium on the conversion of residential hotel units into tourist units. San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (hereinafter Hotel Conversion Ordinance or HCO) §§41.3(a)–(g), App. to Pet. for Cert. 195a–197a. Two years later, the City enacted the first version of the Hotel Conversion Ordinance to regulate all future conversions. San Francisco Ordinance No. 330–81, codified in §41.1 *et seq.* Under the 1981 version of the HCO, a hotel owner could convert residential units into tourist units only by obtaining a conversion permit. And those permits could be obtained only by constructing new residential units, rehabilitating old ones, or paying an "in lieu" fee into the City's Residential Hotel Preservation Fund Account. See §§41.12–41.13, App. to Pet. for Cert. 224a–231a. The City substantially strengthened the HCO in 1990 by eliminating several exceptions that had existed in the 1981 version and increasing the size of the "in lieu" fee hotel owners must pay when converting residential units. See 145 F. 3d 1095, 1099 (CA9 1998).

The genesis of this protracted dispute lies in the 1981 HCO's requirement that each hotel "file an initial unit usage report containing" the "number of residential and tourist units in the hotel[s] as of September 23, 1979." §41.6(b)(1), App. to Pet. for Cert. 206a. Jean Iribarren was operating the San Remo Hotel, pursuant to a lease from petitioners, when this requirement came into effect. Iribarren filed the initial usage report for the hotel, which erroneously reported

that all of the rooms in the hotel were "residential" units.[2] The consequence of that initial classification was that the City zoned the San Remo Hotel as "residential hotel"—in other words, a hotel that consisted entirely of residential units. And that zoning determination ultimately meant that, despite the fact that the San Remo Hotel had operated in practice as a tourist hotel for many years, 145 F. 3d, at 1100, petitioners were required to apply for a conditional use permit to do business officially as a "tourist hotel," *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 27 Cal. 4th 643, 654, 41 P. 3d 87, 94 (2002).

After the HCO was revised in 1990, petitioners applied to convert all of the rooms in the San Remo Hotel into tourist use rooms under the relevant HCO provisions and requested a conditional use permit under the applicable zoning laws. In 1993, the City Planning Commission granted petitioners' requested conversion and conditional use permit, but only after imposing several conditions, one of which included the requirement that petitioners pay a $567,000 "in lieu" fee.[3] Petitioners appealed, arguing that the HCO requirement was unconstitutional and otherwise improperly applied to their hotel. See *id.*, at 656, 41 P. 3d, at 95. The City Board of Supervisors rejected petitioners' appeal on April 19, 1993.

---

[2] It seems that despite this initial classification, the San Remo Hotel has operated as a mixed hotel for tourists and long-term residents since long before the HCO was enacted. According to the California Supreme Court, in "a 1992 declaration by [petitioners], Iribarren filed the 'incorrect' initial unit usage report without their knowledge. They first discovered the report in 1983 when they resumed operation of the hotel. They protested the residential use classification in 1987, but were told it could not be changed because the appeal period had passed." *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 27 Cal. 4th 643, 654, 41 P. 3d 87, 94 (2002).

[3] The application specifically required petitioners (1) to pay for 40 percent of the cost of replacement housing for the 62 lost residential units; (2) to offer lifetime leases to any then-current residential users; and (3) to "obtain variances from floor-area ratio and parking requirements." *Id.*, at 656, 41 P. 3d, at 95.

In March 1993, petitioners filed for a writ of administrative mandamus in California Superior Court. That action lay dormant for several years, and the parties ultimately agreed to stay that action after petitioners filed for relief in Federal District Court.

Petitioners filed in federal court for the first time on May 4, 1993. Petitioners' first amended complaint alleged four counts of due process (substantive and procedural) and takings (facial and as-applied)[4] violations under the Fifth and Fourteenth Amendments to the United States Constitution, one count seeking damages under Rev. Stat. § 1979, 42 U. S. C. § 1983, for those violations, and one pendent state-law claim. The District Court granted respondents summary judgment. As relevant to this action, the court found that petitioners' facial takings claim was untimely under the applicable statute of limitations, and that the as-applied takings claim was unripe under *Williamson County*, 473 U. S. 172.

On appeal to the Court of Appeals for the Ninth Circuit, petitioners took the unusual position that the court should not decide their federal claims, but instead should abstain under *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941), because a return to state court could conceivably moot the remaining federal questions. See App. 67–68; see also 145 F. 3d, at 1101. The Court of Appeals obliged petitioners' request with respect to the facial challenge, a request that respondents apparently viewed as an "outrageous act of chutzpah." *Id.*, at 1105. That claim, the court rea-

[4] Specifically, count 3 alleged that the HCO was facially unconstitutional under the Takings Clause because it "fails to substantially advance legitimate government interests, deprives plaintiffs of the opportunity to earn a fair return on its investment, denies plaintiffs economically viable use of their property, and forces plaintiffs to bear the public burden of housing the poor, all without just compensation." First Amended and Supplemental Complaint, No. C–93–1644–DLJ (ND Cal., Jan. 24, 1994), p. 20, ¶ 49. Count 4, which advanced petitioners' as-applied Takings Clause violation, was predicated on the same rationale. *Id.*, at 21.

soned, was "ripe the instant the 1990 HCO was enacted," *id.*, at 1102, and appropriate for *Pullman* abstention principally because petitioners' "entire case" hinged on the propriety of the planning commission's zoning designation—the precise subject of the pending state mandamus action, 145 F. 3d, at 1105.[5] The court, however, affirmed the District Court's determination that petitioners' as-applied takings claim—the claim that the application of the HCO to the San Remo Hotel violated the Takings Clause—was unripe. Because petitioners had failed to pursue an inverse condemnation action in state court, they had not yet been denied just compensation as contemplated by *Williamson County.* 145 F. 3d, at 1105.

At the conclusion of the Ninth Circuit's opinion, the court appended a footnote stating that petitioners would be free to raise their federal takings claims in the California courts. If, however, they wanted to "retain [their] right to return to federal court for adjudication of [their] federal claim, [they] must make an appropriate reservation in state court." *Id.*, at 1106, n. 7.[6] That is precisely what petitioners attempted to do when they reactivated the dormant California case. Yet petitioners advanced more than just the claims on which the federal court had abstained, and phrased their state claims in language that sounded in the rules and standards established and refined by this Court's takings jurisprudence. Petitioners claimed, for instance, that "imposition of the fee 'fails to substantially advance a legitimate government interest' and that '[t]he amount of the fee imposed is not roughly proportional to the impact' of the proposed tourist use of the San Remo Hotel." 27 Cal. 4th, at 656, 41 P. 3d, at 95 (quoting petitioners' second amended

---

[5] The Court of Appeals did not answer the question whether this claim was barred by the statute of limitations, as the District Court had held.

[6] The reservation discussed in the Ninth Circuit's opinion was the common reservation of federal claims made in state litigation under *England* v. *Louisiana Bd. of Medical Examiners*, 375 U. S. 411, 420–421 (1964).

state complaint).[7] The state trial court dismissed petitioners' amended complaint, but the intermediate appellate court reversed. The court held that petitioners' claim that the payment of the "in lieu" fee effected a taking should have been evaluated under heightened scrutiny. Under more exacting scrutiny, the fee failed this Court's "essential nexus" and "rough proportionality" tests because, *inter alia*, it was based on the original flawed designation that the San Remo Hotel was an entirely "residential use" facility. See *id.*, at 657–658, 41 P. 3d, at 96–97 (summarizing appellate court opinion (internal quotation marks omitted)).

The California Supreme Court reversed over the partial dissent of three justices.[8] The court initially noted that petitioners had reserved their federal causes of action and had sought no relief for any violation of the Federal Constitution. *Id.*, at 649, n. 1, 41 P. 3d, at 91, n. 1.[9] In the portion of its opinion discussing the Takings Clause of the California Constitution, however, the court noted that "we appear to have construed the clauses congruently." *Id.*, at 664, 41 P. 3d, at 100–101 (citing cases). Accordingly, despite the fact that petitioners sought relief only under California law, the state court decided to "analyze their takings claim under the

---

[7] With respect to claims that a regulation fails to advance a legitimate state interest, see generally *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 540–545 (2005). With respect to "rough proportionality" claims, see generally *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987); *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994).

[8] Justice Baxter and Justice Chin opined that because some hotel rooms had been previously rented to tourists, the "in lieu" payment was excessive. 27 Cal. 4th, at 691, 41 P. 3d, at 119–120. Justice Brown opined that a 1985 statute had effectively superseded the HCO and disagreed with the majority's analysis of the constitutional issues. *Id.*, at 699, 700–704, 41 P. 3d, at 125–128.

[9] "Plaintiffs sought no relief in state court for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action. As their petition for writ of mandate, as well, rests solely on state law, no federal question has been presented or decided in this case." *Id.*, at 649, n. 1, 41 P. 3d, at 91, n. 1.

relevant decisions of both this court and the United States Supreme Court." *Ibid.*, 41 P. 3d, at 101.[10]

The principal constitutional issue debated by the parties was whether a heightened level of scrutiny applied to the claim that the housing replacement fee "'does not substantially advance legitimate state interests.'" *Ibid.* (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1016 (1992)). In resolving that debate the court focused on our opinions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994). Rejecting petitioners' argument that heightened scrutiny should apply, the court emphasized the distinction between discretionary exactions imposed by executive officials on an ad hoc basis and "'generally applicable zoning regulations'" involving "'legislative determinations.'" 27 Cal. 4th, at 666–668, 41 P. 3d, at 102–104 (quoting, *e. g.*, *Dolan*, 512 U. S., at 385, 391, n. 8). The court situated the HCO within the latter category, reasoning that the ordinance relied upon fixed fees computed under a formula that is generally applicable to broad classes of property owners.[11] The court concluded that the less demanding "reasonable relationship" test should apply to the HCO's monetary assessments, 27 Cal. 4th, at 671, 41 P. 3d, at 105.

---

[10] See also *id.*, at 665, 41 P. 3d, at 101 ("[I]t is the last mentioned prong of the *high court's takings analysis* that is at issue here" (emphasis added)).

[11] See *id.*, at 669, 41 P. 3d, at 104 (noting that the "HCO is generally applicable legislation in that it applies, without discretion or discrimination, to every residential hotel in the city" and that "no meaningful government discretion enters into either the imposition or the calculation of the in lieu fee"). The court noted that the general class of property owners included more than 500 properties containing over 18,000 rooms, *id.*, at 669, n. 12, 41 P. 3d, at 104, n. 12, and concluded that the HCO "applies to all property in the class logically subject to its strictures, that is, to all residential hotel units; no more can rationally be demanded of local land use legislation in order to qualify for deferential review," *id.*, at 669, 41 P. 3d, at 104.

Applying the "reasonable relationship" test, the court upheld the HCO on its face and as applied to petitioners. As to the facial challenge, the court concluded that the HCO's mandated conversion fees "bear a reasonable relationship to loss of housing . . . in the *generality* or *great majority* of cases . . . ." *Id.*, at 673, 41 P. 3d, at 107. With respect to petitioners' as-applied challenge, the court concluded that the conversion fee was reasonably based on the number of units designated for conversion, which itself was based on petitioners' own estimate that had been provided to the City in 1981 and had remained unchallenged for years. *Id.*, at 678, and n. 17, 41 P. 3d, at 110–111, and n. 17. The court therefore reversed the appellate court and reinstated the trial court's order dismissing petitioners' complaint.

Petitioners did not seek a writ of certiorari from the California Supreme Court's decision in this Court. Instead, they returned to Federal District Court by filing an amended complaint based on the complaint that they had filed prior to invoking *Pullman* abstention.[12] The District Court held that petitioners' facial attack on the HCO was not only barred by the statute of limitations, but also by the general rule of issue preclusion. See App. to Pet. for Cert. 85a–

[12] The third amended complaint, which was filed on November 14, 2002, alleged two separate counts. See App. 88–93. Count 1 alleged that the HCO was facially unconstitutional and unconstitutional as applied to petitioners because (a) it failed "to substantially advance legitimate government interests"; (b) it forced petitioners "to bear the public burden of housing the poor"; and (c) it imposed unreasonable conditions on petitioners' request for a conditional use permit (the in lieu fee and the required lifetime leases to residential tenants). *Id.*, at 88–89. Count 2 sought relief under 42 U. S. C. § 1983 based on (a) extortion through the imposition of the $567,000 fee; (b) an actual taking of property under *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978); (c) the failure of the HCO as applied to petitioners to advance legitimate state interests; (d) the City's requirement that petitioners bear the full cost of providing a general public benefit (public housing) without just compensation.

86a.[13] The District Court reasoned that 28 U. S. C. § 1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered. Because California courts had interpreted the relevant substantive state takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court.

The Court of Appeals affirmed. The court rejected petitioners' contention that general preclusion principles should be cast aside whenever plaintiffs "must litigate in state court pursuant to *Pullman* and/or *Williamson County*." 364 F. 3d 1088, 1096 (CA9 2004). Relying on unambiguous Circuit precedent and the absence of any clearly contradictory decisions from this Court, the Court of Appeals found itself bound to apply general issue preclusion doctrine. Given that general issue preclusion principles governed, the only remaining question was whether the District Court properly applied that doctrine; the court concluded that it did. The court expressly rejected petitioners' contention "that California takings law is not coextensive with federal takings law," *ibid.*, and held that the state court's application of the "reasonable relationship" test was an "'equivalent determination' of such claims under the federal takings clause," *id.*, at 1098.[14] We granted certiorari and now affirm.

---

[13] The District Court found that most of petitioners' as-applied claims amounted to nothing more than improperly labeled facial challenges. See App. to Pet. for Cert. 82a–85a. The remainder of petitioners' as-applied claims, the court held, was barred by the statute of limitations. *Id.*, at 84a–85a.

[14] California courts apply issue preclusion to a final judgment in earlier litigation between the same parties if "(1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case, and (3) the party to be estopped was a party to the prior adjudication." 364 F. 3d, at 1096. The court reasoned that the California Supreme Court's decision satisfied those criteria because petitioners' takings challenges "raised in state court are identical to

II

Article IV, § 1, of the United States Constitution demands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." In 1790, Congress responded to the Constitution's invitation by enacting the first version of the full faith and credit statute. See Act of May 26, 1790, ch. 11, 1 Stat. 122.[15] The modern version of the statute, 28 U. S. C. § 1738, provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . ." This statute has long been understood to encompass the doctrines of res judicata, or "claim preclusion," and collateral estoppel, or "issue preclusion." See *Allen* v. *McCurry*, 449 U. S. 90, 94–96 (1980).[16]

The general rule implemented by the full faith and credit statute—that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction—predates the Republic.[17] It "has found its way into

---

the federal claims . . . and are based on the same factual allegations." *Ibid.* Our limited review in this case does not include the question whether the Court of Appeals' reading of California preclusion law was in error.

[15] "This statute has existed in essentially unchanged form since its enactment just after the ratification of the Constitution . . . ." *Allen* v. *McCurry*, 449 U. S. 90, 96, n. 8 (1980).

[16] "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.*, at 94 (citations omitted).

[17] "The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists." *Washington, Alexandria, & Georgetown Steam-Packet Co.* v. *Sickles*, 24

every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation." *Hopkins* v. *Lee*, 6 Wheat. 109, 114 (1821). This Court has explained that the rule

> "is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 49 (1897).

As this case is presented to us, under our limited grant of certiorari, we have only one narrow question to decide: whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation. See *Williamson County*, 473 U. S. 172.[18]

How. 333, 341 (1861); see also *id.*, at 343 (noting that the rule also has its pedigree "[i]n the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges . . . ").

[18] We did not grant certiorari on many of the issues discussed by the parties and *amici*. We therefore assume for purposes of our decision that all other issues in this protracted controversy have been correctly decided. We assume, for instance, that the Ninth Circuit properly interpreted California preclusion law; that the California Supreme Court was correct in its determination that California takings law is coextensive with federal law; that, as a matter of California law, the HCO was lawfully applied to

The essence of petitioners' argument is as follows: because no claim that a state agency has violated the federal Takings Clause can be heard in federal court until the property owner has "been denied just compensation" through an available state compensation procedure, *id.*, at 195, "federal courts [should be] required to disregard the decision of the state court" in order to ensure that federal takings claims can be "considered on the merits in . . . federal court," Brief for Petitioners 8, 14. Therefore, the argument goes, whenever plaintiffs reserve their claims under *England* v. *Louisiana Bd. of Medical Examiners*, 375 U. S. 411 (1964), federal courts should review the reserved federal claims *de novo*, regardless of what issues the state court may have decided or how it may have decided them.

We reject petitioners' contention. Although petitioners were certainly entitled to reserve some of their federal claims, as we shall explain, *England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard 28 U. S. C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court. We turn first to *England*.

III

England involved a group of plaintiffs who had graduated from chiropractic school, but sought to practice in Louisiana without complying with the educational requirements of the State's Medical Practice Act. 375 U. S., at 412. They filed suit in federal court challenging the constitutionality of the Act. The District Court invoked *Pullman* abstention and stayed the proceedings to enable the Louisiana courts to

---

petitioners' hotel; and that under California law, the "in lieu" fee was imposed evenhandedly and substantially advanced legitimate state interests.

decide a preliminary and essential question of state law—namely, whether the state statute applied at all to chiropractors. 375 U. S., at 413.[19] The state court, however, reached beyond the state-law question and held not only that the statute applied to the plaintiffs but also that its application was consistent with the Fourteenth Amendment to the Federal Constitution. The Federal District Court then dismissed the federal action without addressing the merits of the federal claim.

On appeal, we held that when a federal court abstains from deciding a federal constitutional issue to enable the state courts to address an antecedent state-law issue, the plaintiff may reserve his right to return to federal court for the disposition of his federal claims. *Id.*, at 419. In that case, the antecedent state issue requiring abstention was *distinct* from the reserved federal issue. See *id.*, at 418–419. Our discussion of the "typical case" in which reservations of federal issues are appropriate makes clear that our holding was limited to cases that are fundamentally distinct from petitioners'. "Typical" *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner.[20] In such cases, the purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question. To the contrary, the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy.

---

[19] We stressed in *England* that abstention was essential to prevent the district court from deciding "'questions of constitutionality on the basis of preliminary guesses regarding local law.'" 375 U. S., at 416, n. 7 (quoting *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944)).

[20] 375 U. S., at 420 (describing the "typical case" as one in which "the state courts are asked to construe a state statute against the backdrop of a federal constitutional challenge").

See 375 U. S., at 416–417, and n. 7.[21] Additionally, our opinion made it perfectly clear that the effective reservation of a federal claim was dependent on the condition that plaintiffs take no action to broaden the scope of the state court's review beyond decision of the antecedent state-law issue.[22]

Our holding in *England* does not support petitioners' attempt to relitigate issues resolved by the California courts. With respect to petitioners' facial takings claims, the Court of Appeals invoked *Pullman* abstention after determining that a ripe federal question existed—namely, "the facial takings challenge to the 1990 HCO." 145 F. 3d, at 1105.[23] It did so because " 'land use planning is a sensitive area of social policy' " and because petitioners' pending state mandamus action had the potential of mooting their facial challenge to the HCO by overturning the City's original classification of the San Remo Hotel as a "residential" property. *Ibid.* Thus, petitioners were entitled to insulate from preclusive effect one federal issue—their facial constitutional challenge

---

[21] As we explained in *Allen*, 449 U. S., at 101–102, n. 17, "[t]he holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff *properly invokes* federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law." (Emphasis added and citations omitted.)

[22] 375 U. S., at 419 ("[I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court").

[23] Petitioners' facial challenges to the HCO were ripe, of course, under *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992), in which we held that facial challenges based on the "substantially advances" test need not be ripened in state court—the claims do "not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated." *Ibid.*

to the HCO—while they returned to state court to resolve their petition for writ of mandate.

Petitioners, however, chose to advance broader issues than the limited issues contained within their state petition for writ of administrative mandamus on which the Ninth Circuit relied when it invoked *Pullman* abstention. In their state action, petitioners advanced not only their request for a writ of administrative mandate, 27 Cal. 4th, at 653, 41 P. 3d, at 93, but also their various claims that the HCO was unconstitutional on its face and as applied for (1) its failure to substantially advance a legitimate interest, (2) its lack of a nexus between the required fees and the ultimate objectives sought to be achieved via the ordinance, and (3) its imposition of an undue economic burden on individual property owners. *Id.*, at 672–676, 41 P. 3d, at 106–109. By broadening their state action beyond the mandamus petition to include their "substantially advances" claims, petitioners effectively asked the state court to resolve the same federal issues they asked it to reserve. *England* does not support the exercise of any such right.

Petitioners' as-applied takings claims fare no better. As an initial matter, the Court of Appeals did not abstain with respect to those claims. Instead, the court found that they were unripe under *Williamson County*. The court therefore affirmed the District Court's dismissal of those claims. 145 F. 3d, at 1106. Unlike their "substantially advances" claims, petitioners' as-applied claims were never properly before the District Court, and there was no reason to expect that they could be relitigated in full if advanced in the state proceedings. See *Allen*, 449 U. S., at 101, n. 17. In short, our opinion in *England* does not support petitioners' attempt to circumvent § 1738.

IV

Petitioners' ultimate submission, however, does not rely on *England* alone. Rather, they argue that federal courts simply should not apply ordinary preclusion rules to state-

court judgments when a case is forced into state court by the ripeness rule of *Williamson County*. For support, petitioners rely on the Court of Appeals for the Second Circuit's decision in *Santini*, 342 F. 3d, at 130.

In *Santini*, the Second Circuit held that parties "who litigate state-law takings claims in state court involuntarily" pursuant to *Williamson County* cannot be precluded from having those very claims resolved "by a federal court." 342 F. 3d, at 130. The court did not rest its decision on any provision of the federal full faith and credit statute or our cases construing that law. Instead, the court reasoned that "[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also precluded [them] from ever bringing a Fifth Amendment takings claim." *Ibid.* We find this reasoning unpersuasive for several reasons.

First, both petitioners and *Santini* ultimately depend on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the "right" to have their federal claims relitigated in federal court. See, *e. g.*, *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 84 (1984); *Allen*, 449 U. S., at 103–104. This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules. See *id.*, at 104. The relevant question in such cases is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.

In *Allen*, the plaintiff, Willie McCurry, invoked the Fourth and Fourteenth Amendments in an unsuccessful attempt to suppress evidence in a state criminal trial. After he was convicted, he sought to remedy his alleged constitutional vio-

lation by bringing a suit for damages under 42 U. S. C. § 1983 against the officers who had entered his home. Relying on "'the special role of federal courts in protecting civil rights'" and the fact that § 1983 provided the "only route to a federal forum," the Court of Appeals held that McCurry was entitled to a federal trial unencumbered by collateral estoppel. 449 U. S., at 93. We rejected that argument emphatically.

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself . . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Id.*, at 103–104 (footnote omitted).[24]

As in *Allen*, we are presently concerned only with issues *actually decided* by the state court that are dispositive of federal claims raised under § 1983. And, also as in *Allen*, it

---

[24] We expressed similar views in *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 84 (1984):

"Although such a division may seem attractive from a plaintiff's perspective, it is not the system established by § 1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources."

is clear that petitioners would have preferred not to have been forced to have their federal claims resolved by issues decided in state court. Unfortunately for petitioners, it is entirely *unclear* why their preference for a federal forum should matter for constitutional or statutory purposes.

The only distinction between this case and *Allen* that is possibly relevant is the fact that petitioners here originally invoked the jurisdiction of a Federal District Court, which abstained on *Pullman* grounds while petitioners returned to state court. But petitioners' as-applied takings claims were never properly before the District Court because they were unripe. And, as we have already explained, the Court of Appeals invoked *Pullman* abstention only with respect to petitioners' "substantially advances" takings challenge, which petitioners then gratuitously presented to the state court. At a bare minimum, with respect to the facial takings claim, petitioners were "in an offensive posture in [their] state-court proceeding, and could have proceeded first in federal court had [they] wanted to litigate [their 'substantially advances'] federal claim in a federal forum." *Migra*, 465 U. S., at 85, n. 7. Thus, the only distinction between this case and *Allen* is a distinction of no relevant significance.

The second reason we find petitioners' argument unpersuasive is that it assumes that courts may simply create exceptions to 28 U. S. C. § 1738 wherever courts deem them appropriate. Even conceding, *arguendo*, the laudable policy goal of making federal forums available to deserving litigants, we have expressly rejected petitioners' view. "Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress." *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 485 (1982). Our cases have therefore made plain that "an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Id.*,

at 468 (citing *Allen*, 449 U. S., at 99). Even when the plaintiff's resort to state court is involuntary and the federal interest in denying finality is robust, we have held that Congress "must 'clearly manifest' its intent to depart from § 1738." 456 U. S., at 477.

The same concerns animate our decision here. Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims. Consequently, we apply our normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal. As we explained in *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394 (1981):

> "[W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*.'" *Id.*, at 401 (quoting *Heiser* v. *Woodruff*, 327 U. S. 726, 733 (1946)).

Third, petitioners have overstated the reach of *Williamson County* throughout this litigation. Petitioners were never required to ripen the heart of their complaint—the claim that the HCO was facially invalid because it failed to substantially advance a legitimate state interest—in state court. See *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992). Petitioners therefore could have raised most of their facial takings challenges, which by their nature requested relief distinct from the provision of "just compensation," directly

in federal court.[25] Alternatively, petitioners had the option of reserving their facial claims while pursuing their as-applied claims along with their petition for writ of administrative mandamus. Petitioners did not have the right, however, to seek state review of the same substantive issues they sought to reserve. The purpose of the *England* reservation is not to grant plaintiffs a second bite at the apple in their forum of choice.

With respect to those federal claims that did require ripening, we reject petitioners' contention that *Williamson County* prohibits plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so," 473 U. S., at 194, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Reading *Williamson County* to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to "resort to piecemeal litigation or otherwise unfair procedures." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 350, n. 7 (1986).

It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts. It was settled well before *Williamson County* that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a

---

[25] In all events, petitioners may no longer advance such claims given our recent holding that the "'substantially advances' formula is not a valid takings test, and indeed . . . has no proper place in our takings jurisprudence." *Lingle*, 544 U. S., at 548.

final decision regarding the application of the regulations to the property at issue." 473 U. S., at 186. As a consequence, there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause. To the contrary, most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort.[26]

Moreover, this is not the only area of law in which we have recognized limits to plaintiffs' ability to press their federal claims in federal courts. See, *e. g.*, *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 116 (1981) (holding that taxpayers are "barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts"). State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.

At base, petitioners' claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. The Court of Appeals was correct to decline petitioners' invitation to ignore the re-

---

[26] See, *e. g.*, *Dolan*, 512 U. S., at 383; *Yee*, 503 U. S., at 526; *Nollan*, 483 U. S., at 830; *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 310–311 (1987); *Penn Central*, 438 U. S., at 120–122. Indeed, Justice Holmes' famous "too far" formulation, which spawned our regulatory takings jurisprudence, was announced in a case that came to this Court via a writ of certiorari to Pennsylvania's highest court. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

quirements of 28 U. S. C. § 1738. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be affirmed. Whatever the reasons for petitioners' chosen course of litigation in the state courts, it is quite clear that they are now precluded by the full faith and credit statute, 28 U. S. C. § 1738, from relitigating in their 42 U. S. C. § 1983 action those issues which were adjudicated by the California courts. See *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 84 (1984); *Allen* v. *McCurry*, 449 U. S. 90, 103–105 (1980). There is no basis for us to except from § 1738's reach all claims brought under the Takings Clause. See, *e. g.*, *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 485 (1982). I write separately to explain why I think part of our decision in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), may have been mistaken.

In *Williamson County*, the respondent land developer filed a § 1983 suit in federal court alleging a regulatory takings claim after a regional planning commission disapproved respondent's plat proposals, but before respondent appealed that decision to the zoning board of appeals. *Id.*, at 181–182. Rather than reaching the merits, we found the claim was brought prematurely. *Id.*, at 200. We first held that the claim was "not ripe until the government entity charged with implementing the regulations [had] reached a final decision regarding the application of the regulations to the property at issue." *Id.*, at 186. Because respondent failed to seek variances from the planning commission or the zoning board of appeals, we decided that respondent had failed to meet the final-decision requirement. *Id.*, at 187–191. We then

noted a "second reason the taking claim [was] not yet ripe": "respondent did not seek compensation through the procedures the State [had] provided for doing so." *Id.*, at 194. Until the claimant had received a final denial of compensation through all available state procedures, such as by an inverse condemnation action, we said he could not "claim a violation of the Just Compensation Clause." *Id.*, at 195–196.

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. See, *e. g.*, *id.*, at 194, n. 13 ("The nature of the constitutional right . . . requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action"). More recently, we have referred to it as merely a prudential requirement. *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 733–734 (1997). It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim. Cf. *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 516 (1982) (holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies).[1]

The Court today attempts to shore up the state-litigation requirement by referring to *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981). *Ante*, at 347.

---

[1] In creating the state-litigation rule, the Court, in addition to relying on the Fifth Amendment's text, analogized to *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), and *Parratt* v. *Taylor*, 451 U. S. 527 (1981). As several of petitioners' *amici* in this case have urged, those cases provided limited support for the state-litigation requirement. See Brief for Defenders of Property Rights et al. as *Amici Curiae* 9–12; Brief for Elizabeth J. Neumont et al. as *Amici Curiae* 10–14.

There, we held that the principle of comity (reflected in the Tax Injunction Act, 28 U. S. C. § 1341) bars taxpayers from asserting § 1983 claims against the validity of state tax systems in federal courts. 454 U. S., at 116. Our decision that such suits must be brought in state court was driven by the unique and sensitive interests at stake when federal courts confront claims that States acted impermissibly in administering their own tax systems. *Id.*, at 102–103, 107–113. Those historically grounded, federalism-based concerns had led to a longstanding, "fundamental principle of comity between federal courts and state governments . . . , particularly in the area of state taxation," a principle which predated the enactment of § 1983 itself. *Id.*, at 103, 107–114. We decided that those interests favored requiring that taxpayers bring challenges to the validity of state tax systems in state court, despite the strong interests favoring federal court review of alleged constitutional violations by state officials. *Id.*, at 115–116.

The Court today makes no claim that any such longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed. The Court does remark, however, that state courts are more familiar with the issues involved in local land-use and zoning regulations, and it suggests that this makes it proper to relegate federal takings claims to state court. *Ante*, at 347. But it is not apparent that any such expertise matches the type of historically grounded, federalism-based interests we found necessary to our decision in *Fair Assessment*. In any event, the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, see, *e. g.*, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S.

41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), or the Equal Protection Clause, see, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974). In short, the affirmative case for the state-litigation requirement has yet to be made.

Finally, *Williamson County*'s state-litigation rule has created some real anomalies, justifying our revisiting the issue. For example, our holding today ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. *Ante*, at 346–347. And, even if preclusion law would not block a litigant's claim, the *Rooker-Feldman* doctrine might, insofar as *Williamson County* can be read to characterize the state courts' denial of compensation as a required element of the Fifth Amendment takings claim. See *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 544 U. S. 280 (2005). As the Court recognizes, *ante*, at 346–347, *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound, see *ante*, at 347, and would apply to any number of federal claims. Cf. 28 U. S. C. § 2254 (providing for limited federal habeas review of state-court adjudications of alleged violations of the Constitution). But that principle does not explain why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.[2]

---

[2] Indeed, in some States the courts themselves apply the state-litigation requirement from *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), refusing to entertain any federal takings claim until the claimant receives a final denial of compensation through all the available state procedures. See, *e. g.*, *Breneric Assoc.* v. *City of Del Mar*, 69 Cal. App. 4th 166, 188–189, 81

* * *

I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.

Cal. Rptr. 2d 324, 338–339 (1998); *Melillo* v. *City of New Haven*, 249 Conn. 138, 154, n. 28, 732 A. 2d 133, 143, n. 28 (1999). This precludes litigants from asserting their federal takings claim even in *state* court. The Court tries to avoid this anomaly by asserting that, for plaintiffs attempting to raise a federal takings claim in state court as an alternative to their state claims, *Williamson County* does not command that the state courts themselves impose the state-litigation requirement. *Ante*, at 346. But that is so only if *Williamson County*'s state-litigation requirement is merely a prudential rule, and not a constitutional mandate, a question that the Court today conspicuously leaves open.

Syllabus

DODD *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04–5286. Argued March 22, 2005—Decided June 20, 2005

On April 4, 2001, petitioner Dodd filed a *pro se* motion under 28 U. S. C. § 2255, claiming that his conviction for knowingly and intentionally engaging in a continuing criminal enterprise, in violation of 21 U. S. C. §§ 841 and 846, should be set aside because it was contrary to *Richardson* v. *United States*, 526 U. S. 813, 815, which held that a jury must agree unanimously that a defendant is guilty of each of the specific violations that together constitute the continuing criminal enterprise. The District Court held that, because *Richardson* had been decided more than one year before Dodd filed his motion, the motion was untimely under § 2255, ¶ 6(3), which provides that § 2255's 1-year limitation period begins to run on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." On appeal, Dodd argued that ¶ 6(3)'s limitation period began to run on April 19, 2002, the date the Eleventh Circuit recognized *Richardson*'s retroactive application to cases on collateral review. The Eleventh Circuit held that the period began to run on June 1, 1999, the date that this Court initially decided *Richardson*.

Held:

1. The 1-year limitation period under ¶ 6(3) begins to run on the date on which this Court "initially recognized" the right asserted in an applicant's motion, not the date on which that right was made retroactive. The text of ¶ 6(3) unequivocally identifies one, and only one, date from which the limitation period is measured: "the date on which the right asserted was initially recognized by the Supreme Court." This Court presumes that a legislature says what it means and means what it says in a statute. Dodd's reliance on ¶ 6(3)'s second clause to identify the operative date is misplaced. That clause merely limits the subsection's applicability to cases in which applicants assert rights "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Thus, ¶ 6(3)'s date—"the date on which the right asserted was initially recognized by the Supreme Court"—does not apply at all unless the conditions in the second clause are satisfied. This result may make it difficult for applicants filing second or succes-

sive § 2255 motions to obtain relief, since this Court rarely announces a new rule of constitutional law and makes it retroactive within a year, but the Court is not free to rewrite the statute that Congress has enacted. Pp. 356–360.

2. Because Dodd's § 2255 motion was filed more than a year after this Court decided *Richardson*, his motion was untimely. P. 360.

365 F. 3d 1273, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Part II, except for n. 4, *post*, p. 360. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 371.

Janice L. Bergmann argued the cause and filed briefs for petitioner.

James A. Feldman argued the cause for the United States. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Title 28 U. S. C. § 2255 establishes a "1-year period of limitation" within which a federal prisoner may file a motion to vacate, set aside, or correct his sentence under that section. That period runs from "the latest" of a number of events, which are enumerated in subparagraphs (1) through (4) of ¶ 6 of that section. This case involves subparagraph (3), which provides that the limitation period begins to run on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." We must decide whether the date from which the limitation period begins to run under ¶ 6(3) is the date on which this Court "initially recog-

**Jeffrey T. Green, David M. Porter, Carol A. Brook, Henry J. Bemporad*, and *Frances H. Pratt* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

nized" the right asserted in an applicant's § 2255 motion, or whether, instead, it is the date on which the right is "made retroactiv[e]."

I

Petitioner Michael Donald Dodd was indicted on June 25, 1993, for knowingly and intentionally engaging in a continuing criminal enterprise in violation of 21 U. S. C. §§ 841 and 846, conspiring to possess with intent to distribute marijuana in violation of § 841(a)(1), conspiring to possess with intent to distribute cocaine in violation of § 841(a)(1), and 16 counts of using and possessing a passport obtained by false statement in violation of 18 U. S. C. § 1546(a). He was convicted of all counts except the cocaine charge, and was sentenced to 360 months' imprisonment followed by five years of supervised release. The Court of Appeals for the Eleventh Circuit affirmed on May 7, 1997. 111 F. 3d 867 *(per curiam)*. Because Dodd did not file a petition for certiorari, his conviction became final on August 6, 1997. See *Clay* v. *United States*, 537 U. S. 522, 525 (2003).

On April 4, 2001, more than three years after his conviction became final, Dodd filed a *pro se* motion under 28 U. S. C. § 2255 seeking to set aside his conviction for knowingly and intentionally engaging in a continuing criminal enterprise, based on our decision in *Richardson* v. *United States*, 526 U. S. 813 (1999). *Richardson* held that a jury must agree unanimously that a defendant is guilty of each of the specific violations that together constitute the continuing criminal enterprise. *Id.*, at 815. Dodd argued, among other things, that he was entitled to relief because his jury had not been instructed that they had to agree unanimously on each predicate violation. App. 9. The District Court dismissed Dodd's § 2255 motion as time barred. *Id.*, at 11–15. Because *Richardson* had been decided more than one year before Dodd filed his motion, the court held that the motion was untimely; it also rejected Dodd's request for equitable tolling. App. 13–15.

Dodd appealed, arguing that the limitation period in § 2255, ¶ 6(3), did not begin to run until April 19, 2002, when the Court of Appeals for the Eleventh Circuit held in *Ross* v. *United States*, 289 F. 3d 677 *(per curiam)*, that the right recognized in *Richardson* applies retroactively to cases on collateral review. The Eleventh Circuit held that the limitation period began to run on "the date the Supreme Court *initially* recognizes the right"—the date *Richardson* was decided—and accordingly affirmed the dismissal of Dodd's motion as time barred. 365 F. 3d 1273, 1283 (2004).

We granted certiorari, 543 U. S. 999 (2004), to resolve a conflict in the Courts of Appeals over when the limitation period in ¶ 6(3) begins to run. Compare, *e. g.*, 365 F. 3d, at 1283 (case below) (period runs from date of Supreme Court decision initially recognizing right asserted); and *United States* v. *Lopez*, 248 F. 3d 427, 432–433 (CA5 2001) (same), with *Pryor* v. *United States*, 278 F. 3d 612, 616 (CA6 2002) (period does not begin to run until right has been held retroactively applicable to cases on collateral review); and *United States* v. *Valdez*, 195 F. 3d 544, 547–548 (CA9 1999) (same).

II

Section 2255, ¶ 6, provides:

> "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> "(1) the date on which the judgment of conviction becomes final;
>
> "(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> "(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been

newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

In most cases, the operative date from which the limitation period is measured will be the one identified in ¶ 6(1): "the date on which the judgment of conviction becomes final." *Ibid.*; see also *Clay*, *supra*, at 524. But later filings are permitted where subparagraphs (2)–(4) apply. This case involves ¶ 6(3), which gives § 2255 applicants one year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Dodd contends that under subparagraph (3), the limitation period runs from the date on which the right asserted was made retroactively applicable. The United States, on the other hand, argues that it runs from the date on which this Court initially recognized the right asserted.

We believe that the text of ¶ 6(3) settles this dispute. It unequivocally identifies one, and only one, date from which the 1-year limitation period is measured: "the date on which the right asserted was initially recognized by the Supreme Court." We "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). What Congress has said in ¶ 6(3) is clear: An applicant has one year from the date on which the right he asserts was initially recognized by this Court.

Dodd urges us to adopt a different interpretation. He contends that the second clause in ¶ 6(3) affects the applicable date under that provision. He reads ¶ 6(3) as containing "three distinct prerequisites" that "must be satisfied before the limitation period begins." Brief for Petitioner 8. Those three prerequisites are: (1) the right asserted by the

applicant "was initially recognized" by this Court; (2) this Court "newly recognized" the right; and (3) a court must have "made" the right "retroactively applicable to cases on collateral review." *Id.*, at 13–14 (internal quotation marks omitted). Because the Court of Appeals for the Eleventh Circuit did not hold the right recognized in *Richardson* v. *United States*, 526 U. S. 813 (1999), retroactively applicable until April 19, 2002, when it decided *Ross*, 289 F. 3d 677, Dodd contends that he had until April 19, 2003—one year from the date when all three prerequisites were satisfied—to file his § 2255 motion.

Dodd's interpretation does not square with the only natural reading of the text. Paragraph 6(3) identifies *one date and one date only* as the date from which the 1-year limitation period runs: "the date on which the right asserted was initially recognized by the Supreme Court." Dodd's reliance on the second clause to identify the operative date is misplaced. That clause—"if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"—imposes a condition on the applicability of this subsection. See Webster's Third New International Dictionary 1124 (1993) (the definition of "if" is "in the event that" or "on condition that"). It therefore limits ¶ 6(3)'s application to cases in which applicants are seeking to assert rights "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2255, ¶ 6(3). That means that ¶ 6(3)'s date—"the date on which the right asserted was initially recognized by the Supreme Court"—does not apply at all if the conditions in the second clause—the right "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"—have not been satisfied. As long as the conditions in the second clause are satisfied so that ¶ 6(3) applies in the first place, that clause has no impact whatsoever on the date from which the 1-year limitation period in ¶ 6(3) begins to run. Thus, if this Court decides a case recognizing a new right, a federal prisoner

seeking to assert that right will have one year from this Court's decision within which to file his § 2255 motion. He may take advantage of the date in the first clause of ¶ 6(3) only if the conditions in the second clause are met.

We recognize that the statute of limitations in ¶ 6(3) makes it difficult for applicants filing second or successive § 2255 motions to obtain relief. The limitation period in ¶ 6(3) applies to "all motions" under § 2255, initial motions as well as second or successive ones. Section 2255, ¶ 8(2), narrowly restricts an applicant's ability to file a second or successive motion. An applicant may file a second or successive motion only in limited circumstances, such as where he seeks to take advantage of "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255, ¶ 8(2). Dodd points out that this Court rarely decides that a new rule is retroactively applicable within one year of initially recognizing that right. Thus, because of the interplay between ¶¶ 8(2) and 6(3), an applicant who files a second or successive motion seeking to take advantage of a new rule of constitutional law will be time barred except in the rare case in which this Court announces a new rule of constitutional law and makes it retroactive within one year.

Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000) (internal quotation marks omitted). See also *Tyler* v. *Cain*, 533 U. S. 656, 663, n. 5 (2001) ("[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds"). The disposition required by the text here, though strict, is not absurd. It is for Congress, not this Court, to amend the statute if it

believes that the interplay of ¶¶ 8(2) and 6(3) of § 2255 unduly restricts federal prisoners' ability to file second or successive motions.

JUSTICE STEVENS would hold, contrary to the plain text, that the limitation period in ¶ 6(3) begins to run when the right asserted is made retroactive, see *post*, at 369 (dissenting opinion), because he assumes that "the most natural reading of the statutory text would make it possible for the limitations period to expire before the cause of action accrues," *post*, at 361. JUSTICE STEVENS analogizes this case to *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, *post*, p. 409, see *post* this page and 361 (dissenting opinion), but *Graham County* is distinguishable. The text of the statute at issue in *Graham County* is ambiguous, justifying the Court's partial reliance on "the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" See *Graham County*, *post*, at 415–418, 419, n. 2. Here, there is no such ambiguity; ¶ 6(3) clearly specifies the date on which the limitation period begins to run.

III

Dodd's § 2255 motion sought to benefit from our holding in *Richardson*, *supra*, which was decided on June 1, 1999. Thus, he had one year from that date within which to file his motion. Because he did not file his motion until April 4, 2001, the motion was untimely. We therefore affirm the judgment of the Court of Appeals for the Eleventh Circuit.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join as to Part II, dissenting.

Because the same anomalous factor is present in both this case and in *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, *post*, p. 409, and is decisive in my analysis of both cases, it is appropriate to explain

my views in a single opinion. In each case the most natural reading of the statutory text would make it possible for the limitations period to expire before the cause of action accrues. Whether the source of this possible result is merely the use of careless wording or an incorrect assumption by Congress concerning the timing of two relevant events, I am convinced that Congress did not intend to authorize such a perverse result in either case. Thus, while I agree with much of the reasoning in the Court's cogent opinion in *Graham County*, I write separately because I would agree with the Court of Appeals' reading of the text of 31 U. S. C. § 3731(b)(1) were it not for this anomaly. In this case, however, because that same factor provides an even stronger reason for rejecting the interpretation of 28 U. S. C. § 2255, ¶ 6(3), that the Court endorses, I would reverse the judgment of the Court of Appeals.

I

In *Graham County*, the relator and the Government argue (and the Court of Appeals held) that the 6-year limitations period applicable to a "civil action under section 3730," 31 U. S. C. § 3731(b)(1), applies to the retaliation action authorized by § 3730(h). That argument is supported by a literal reading of the statutory text; for § 3730(h) plainly qualifies as a "civil action under section 3730." Moreover, that reading derives strong support from the interest in having a uniform federal statute of limitations govern the litigation of federal causes of action. Cf. *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369, 377–383 (2004). Nevertheless, I agree with the Court that another reading of the text is far more plausible, and with its conclusion that when choosing between two constructions of a statute of limitations, whenever possible we should prefer the construction that starts the time limit running when the cause of action accrues.[1]

[1] Contrary to the Court's comment in *Graham County*, *post*, at 419, n. 2, I do not suggest that a statute providing that the limitations period begins to run before the cause of action accrues is necessarily ambig-

In *Graham County* that choice is compelled by the interaction between two relevant events: the "violation of § 3729" and the retaliatory act against the whistle-blower. Section 3731(b)(1) provides that a "civil action under section 3730" must be brought within six years of a "violation of section 3729." If this section were read to encompass retaliation claims under § 3730(h), as held by the Court of Appeals, the statute of limitations would be triggered by the "violation of section 3729"; that is, the limitations period would begin to run before the cause of action for retaliation accrues, and could potentially expire before an actionable retaliation claim even exists. See *Graham County*, *post*, at 421–422; *United States ex rel. Wilson* v. *Graham County Soil & Water Conservation Dist.*, 367 F. 3d 245, 260–261 (CA4 2004) (Wilkinson, J., dissenting). Thus, the potentially prolonged time period between the two relevant events—the violation of § 3729 (triggering the limitations period) and the retaliation against the whistle-blower (giving rise to an actionable claim)—could leave the well-intentioned whistle-blower without any recourse under § 3730(h), the very statute designed to provide such protection.

---

uous. Rather, as JUSTICE THOMAS' scholarly footnote demonstrates, *Graham County*, *post*, at 419–421, n. 3, it is so unlikely that a legislature would actually intend such an anomalous design that I would presume that the anomaly was the product of a drafting error absent evidence in either the legislative history or elsewhere in the text that Congress specifically intended such a result. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. 50, 65–66 (2004) (STEVENS, J., concurring).

The literal text of § 3731(b)(1), which uses an event that is not an element of the retaliation cause of action to start the limitations period running, produces two anomalies: (1) The statute may never begin to run, and (2) it may expire before the cause of action accrues. The Court argues that the first anomaly makes the statute ambiguous and that the second justifies resort to a default rule to resolve the ambiguity. In my judgment, the latter anomaly would provide a sufficient justification for resort to the default rule whether or not some other feature of the statute would support an argument that the text was "ambiguous."

The Court rightly avoids that harsh and counterintuitive result by adopting a construction of the statute that would generally start the running of the limitations period from the date the cause of action accrues, *i. e.*, when the act or acts of retaliation occur. As JUSTICE THOMAS explains, that is not only the prevailing rule applied throughout the country to analogous state-law claims, *Graham County*, *post*, at 419–421, n. 3; it is also the background norm against which Congress legislates, *Graham County*, *post*, at 418–419. Because Congress surely did not intend to create a cause of action for retaliation with one hand, and impose with the other a premature trigger date for the limitations period with the potential to bar retaliation claims altogether, I concur in the judgment in *Graham County*.

II

The same potential for premature expiration of a statute of limitations is the primary reason why I cannot join the Court's anomalous construction of the statute in this case. The statute we are called upon to interpret provides a 1-year period of limitation for a habeas petition that has as its basis a new rule of criminal law or criminal procedure that has retroactive application. Title 28 U. S. C. § 2255, ¶ 6(3), provides that the "limitation period shall run from . . . the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." There are two possible interpretations of when the period should start to run: from the date that this Court recognizes the new right, or from the date that both conditions[2] in ¶ 6(3) are met.

[2] Section 2255, ¶ 6(3), technically has three requirements: that a right be "initially recognized," that it be "newly recognized," and that it be "made retroactively applicable." In practice, however, the first two requirements are one and the same. Hence, in this opinion I will refer only to the requirements (1) that a right be newly recognized and (2) that it be made retroactively applicable.

If, as I believe Congress thought to be the case, this Court made a decision concerning a new rule's retroactive application at the same time it recognized the new right, the statutory scheme would make perfect sense: Petitioners, whether filing an initial habeas petition or a second or successive petition, would have one year from this Court's decision to file a petition for a writ taking advantage of that decision. Within a relatively short amount of time, those claims would be adjudicated, and the statute's goals of finality would be duly served. In practice, however, this Court does not ordinarily make retroactivity judgments at the time a new right is recognized.[3] See, *e. g.*, *Ring* v. *Arizona*, 536 U. S. 584 (2002) (applying *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), to determinations of death penalty eligibility); *Schriro* v. *Summerlin*, 542 U. S. 348 (2004) (concluding *Ring* was not retroactive). Thus, as in *Graham County*, the statute implicates two relevant events: this Court's recognition of a new right (which, according to the majority, triggers the limitations period) and the declaration that the right can be applied retroactively (which allows a petitioner to proceed with the claim). Because a significant amount of time may elapse during the interval between the triggering event and the point at which a petitioner may actually be able to file an action seeking relief under the statute, there is a real risk that the 1-year limitations period will expire before the cause of action accrues. In my judgment, the probable explanation for statutory text that creates this risk is Congress' apparent assumption that our recognition of the new right and our decision to apply it retroactively would be made at the same time. Otherwise it seems nonsensical to assume that Congress deliberately enacted a statute that recognizes a cause of action, but wrote the limitations period in a way that

[3] The retroactivity issue is not normally argued in the same case that announces a new rule because the prisoner is only interested in the outcome of his own case. Moreover, in order to minimize the impact of the new rule at issue, he actually has an incentive to minimize its consequences.

precludes an individual from ever taking advantage of the cause of action.

We are thus faced with the same decision as in *Graham County:* Do we interpret the statute in such a way as to allow prisoners such as Dodd to take advantage of the full year Congress provided for such claims, or do we interpret the statute in such a way that the limitations period will begin to run before a prisoner may take advantage of ¶ 6(3)? As an initial matter, the text here certainly permits both readings, just as it did in *Graham County.* Paragraph 6(3) requires that two prerequisites must be met before a habeas petitioner can take advantage of that date as the starting point for the statute of limitations. Both requirements are in the past tense, and both must be satisfied before ¶ 6(3) is applicable. Furthermore, just as the clause "if that right has been newly recognized by the Supreme Court" describes the date indicated in the phrase "the date on which the right asserted was initially recognized," it is possible to read the subordinate clause "if that right has been . . . made retroactively applicable to cases on collateral review" as amplifying the description of the date in the provision's main clause, rather than adding an additional qualifier. Consequently, while the majority's reading of ¶ 6(3)—requiring that the statute of limitations begin to run when this Court recognizes a new rule—may be the more natural reading of the text, that advocated by petitioner—starting the statute of limitations when the new rule is held to be retroactive—is by no means implausible.[4]

---

[4] I should note an additional point of disagreement with the majority (and with petitioner). In reaching its result, the Court relies on an assumption made by both parties and not challenged in this Court: namely, that the decision to make a new rule retroactive for purposes of this section can be made by any lower court. While I recognize that every Circuit to have addressed the issue has made the same assumption, I am satisfied that the Government's initial interpretation of this provision is the correct one. See Brief for United States as *Amicus Curiae* in *Tyler* v. *Cain*, O. T. 2000, No. 00–5961, p. 16, n. 7. Under that interpretation, the requirement that the "right has been newly recognized by the Su-

Moreover, the potential for claims to be prematurely barred by the statute of limitations is even greater than in *Graham County*. There, the possibility that the 6-year statute of limitations period could run before the cause of action accrued, while plausible, was not particularly likely, since in

---

preme Court and made retroactively applicable to cases on collateral review" is met only if the *Supreme Court* has made the right retroactive.

Courts that have reached the contrary conclusion have principally relied on the fact that 28 U. S. C. § 2244(b)(2)(A) contains an explicit requirement that a new rule be "made retroactive . . . *by the Supreme Court*." (Emphasis added.) See *Ashley* v. *United States*, 266 F. 3d 671, 674 (CA7 2001). Thus, the argument goes, the absence of "by the Supreme Court" after "made retroactive" must have some meaning. However, in that clause there is only one verb that the prepositional phrase "by the Supreme Court" can modify, whereas in the relevant clause of § 2255, ¶ 6(3), there are two: newly recognized and made retroactive. The more natural reading of ¶ 6(3) is that the prepositional phrase "by the Supreme Court" modifies *both* verbs of the subordinate clause. This reading comports with Congress' general direction that this Court, and not the lower courts, should provide the final answer to questions of interpretation arising under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See, *e. g.*, 28 U. S. C. § 2254(d)(1) (requiring that a state-court decision be contrary to "clearly established Federal law, *as determined by the Supreme Court of the United States*" (emphasis added)). Additionally, it avoids difficult questions of which court can make a retroactivity determination, sets a uniform date by which lower courts can make determinations as to whether a petition is timely, and means that only those cases made retroactive by this Court can form the basis for a petition that can gain the benefit of tolling under § 2255, ¶ 6(3). Finally, it is the only interpretation that gives full effect to § 2255, ¶ 8(2), which allows prisoners who have already completed one round of federal habeas review to seek additional relief on the basis of such a new rule.

Ultimately, this reading has no direct bearing on the question presented in this case. While my view that this Court must make the retroactivity determination informs my belief that Congress had a mistaken understanding of how ¶ 6(3) would operate in practice, I would conclude that the 1-year limitations period begins to run when both requirements of ¶ 6(3) are met regardless of which court makes the retroactivity decision.

JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER do not join this footnote.

most cases the retaliatory conduct that would form the basis of the cause of action under 31 U. S. C. § 3730(h) would probably occur within six years of the violation of § 3729.[5] In this case, owing to the substantially shorter 1-year statute of limitations period, both requirements of 28 U. S. C. § 2255, ¶ 6(3), will often not be met before the statute of limitations period has expired if it is triggered by the decision of the Supreme Court announcing a new rule.

That result is certainly true for Dodd himself. *Richardson* v. *United States*, 526 U. S. 813, was decided on June 1, 1999. Under the majority's interpretation, the statute of limitations thus expired on June 1, 2000, one year after we recognized the new rule. The Eleventh Circuit, however, did not decide whether *Richardson* was retroactive until April 19, 2002.[6] See *Ross* v. *United States*, 289 F. 3d 677 (CA11 2002) *(per curiam)*. Thus, Dodd would not, under the majority's interpretation, have been able to raise his claim at all, since the statute of limitations expired before he could have taken advantage of ¶ 6(3)'s 1-year grace period.[7]

---

[5] As the majority in *Graham County* noted, however, in almost every case the statute of limitations would begin to run before the cause of action actually accrued. See *post*, at 421.

[6] This assumes that the Eleventh Circuit is the relevant "court" to decide the retroactivity question, an issue the majority fails to address. Even if a district court, as opposed to the Court of Appeals, could make that determination for purposes of ¶ 6(3), the District Court for the Southern District of Florida has not decided the issue in a published opinion.

[7] This would be true for prisoners in every Circuit except the Sixth Circuit, in which a prisoner would have had six months to file his petition. See *Murr* v. *United States*, 200 F. 3d 895 (Jan. 7, 2000). In the five other Circuits besides the Eleventh to have decided the issue, all held *Richardson* v. *United States*, 526 U. S. 813 (1999), to be retroactive more than one year after *Richardson* was decided; in all of those Circuits, prisoners' claims under *Richardson* would be time barred before they were able to file under ¶ 6(3). See *Santana-Madera* v. *United States*, 260 F. 3d 133 (CA2, Aug. 3, 2001); *United States* v. *Lopez*, 248 F. 3d 427 (CA5, Apr. 16, 2001); *Lanier* v. *United States*, 220 F. 3d 833 (CA7, June 12, 2000); *United*

Even for those prisoners who are incarcerated in a jurisdiction in which the new rule is quickly held to be retroactive, at least part of the 1-year period in which to file a claim taking advantage of the retroactive rule will run before the petition raising the claim can be filed.[8]

Thus, the admonition in *Graham County* that "Congress generally drafts statutes of limitations to begin when the cause of action accrues," *post*, at 418, applies with special force in this case. Paragraph 6(3) both recognizes a basis for habeas relief by allowing an otherwise barred claim to go forward if certain conditions are met, and also sets forth a 1-year statute of limitations for such claims. It would make no sense for Congress, in the same provision, both to recognize a potential basis for habeas relief and also to make it highly probable that the statute of limitations would bar relief before the claim can be brought. Again, this is not simply a remote possibility: It is true for Dodd himself, and in six of the seven Circuits to have addressed whether *Richardson* is retroactive. See n. 7, *supra*. It is this absurd result that convinces me that Congress could not have in-

---

States v. *Montalvo*, 331 F. 3d 1052 (CA9, June 9, 2003) *(per curiam)*; *United States* v. *Barajas-Diaz*, 313 F. 3d 1242 (CA10, Dec. 3, 2002); *Ross* v. *United States*, 289 F. 3d 677 (CA11, Apr. 19, 2002) *(per curiam)*. The Eighth Circuit appears to have assumed the retroactive application of *Richardson*, but that too was decided more than a year after *Richardson* itself. See *United States* v. *Scott*, 218 F. 3d 835 (July 7, 2000). Of course, if any of the other four Circuits that have not yet decided the issue were to conclude *Richardson* was retroactive, the statute of limitations would have long since expired, and prisoners would be similarly barred from taking advantage of any such decision.

[8] In *Tyler* v. *Cain*, 533 U. S. 656 (2001), it appeared that a majority of the Court recognized that the Court could make a new rule retroactive "through multiple holdings that logically dictate the retroactivity of the new rule." *Id.*, at 668 (O'CONNOR, J., concurring). In such a case, a prisoner could file a petition under ¶ 6(3) immediately. Since there was much disagreement over when that would be the case, however, that potential exception holds small comfort in this case.

tended that ¶ 6(3) should be read in this manner. Even if the text is as clear as the majority claims (a proposition I reject), we should still interpret the text in a manner that would avoid such an absurd result. See, *e. g.*, *Clinton* v. *City of New York*, 524 U. S. 417, 429 (1998); *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892).

To avoid this result, I would interpret ¶ 6(3) to begin to run only when the Supreme Court has initially recognized the new right *and* when that right has been held to be retroactive. Under this interpretation, the statute of limitations would not begin to run until the prisoner was actually able to file a petition under ¶ 6(3), which is the only interpretation Congress could have intended. Although in enacting AEDPA Congress was clearly concerned with finality, see *Duncan* v. *Walker*, 533 U. S. 167, 179 (2001), ¶ 6(3) is an explicit exception to that general preference. Congress surely intended to allow habeas petitioners to take advantage of the new rights that this Court deems retroactive. Otherwise, there would have been no reason to include that section in the statute. That is why, "[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief." *Graham County*, *post*, at 419 (quoting *TRW Inc.* v. *Andrews*, 534 U. S. 19, 37 (2001) (SCALIA, J., concurring in judgment; internal quotation marks omitted).[9]

---

[9]The approach that the Court takes in *Graham County* and the approach I would take here has support in our prior case law. In *Fleischmann Constr. Co.* v. *United States ex rel. Forsberg*, 270 U. S. 349 (1926), the Court was faced with the interpretation of the Materialmen's Act of 1894, as amended, which allowed a private creditor to bring suit against a party contracting with the United States, provided that the United States did not itself bring suit "within six months from the completion and final settlement" of the contract. 33 Stat. 812. Such a creditor had one year from the completion of the contract and final settlement to bring a suit, giving him a 6-month window within which to file his claims. If any other creditors wanted to bring suit, they had to join the action of the original

In addition to creating the perverse result that the statute of limitations will run before a prisoner can file an initial habeas petition, the Court's myopic reading of ¶ 6(3) effectively nullifies 28 U. S. C. § 2244(b)(2)(A), which allows prisoners to file second or successive applications based on a retroactive rule.[10] As the majority recognizes in what amounts to a dramatic understatement, its interpretation of ¶ 6(3) "makes it difficult for applicants filing second or successive § 2255 motions to obtain relief." *Ante*, at 359. Because of the way ¶¶ 6(3) and 8(2) interact, a prisoner can only file a second or successive petition based on a newly recognized rule that has been made retroactive if this Court has held

---

creditor, but under the statute had only one year from "the completion of the work" in which to do so. *Ibid.* As the Court in *Fleischmann* recognized, if taken literally this last section would have meant that in a case in which the "final settlement" of the contract occurred more than six months after work was completed on the contract—as "frequently" happened—only the initial creditor to file suit would have been able to meet the requirement of the statute of limitations; any subsequent creditor would have been barred under the second statute of limitations that did not reference the final settlement as a start date, but rather only the completion of work. 270 U. S., at 361. Rather than permit these "unjust or absurd consequences," *id.*, at 360, the Court interpreted "within one year from the completion of the work" to mean "'within one year after the performance and final settlement of the contract,'" *id.*, at 362.

Fleischmann thus presents the identical situation as in *Graham County* and *Dodd:* Because of the unforeseen possibility that two relevant events might occur far apart in time, the most natural reading of the statute would cause the statute of limitations to expire before the suit may be brought. As we did in *Fleischmann* and in *Graham County*, we should construe the statute of limitations in *Dodd* to avoid this unnatural result.

[10] Our cases make clear that when interpreting a particular section of a statute, we look to the entire statutory scheme rather than simply examining the text at issue. See *Koons*, 543 U. S., at 60. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, *or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.*" *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988) (citation omitted and emphasis added).

the rule to be retroactive within one year of recognizing it. Unfortunately for such prisoners, however, this Court has never done so since *Teague* v. *Lane*, 489 U. S. 288 (1989), was decided.[11] Because of the need for percolation, and the time it takes for cases to come to this Court from the courts below, it seems unlikely (to say the least) that we would ever do so. Therefore, the majority's interpretation of ¶ 6(3) effectively nullifies ¶ 8(2). It is, of course, a basic canon of statutory construction that we will not interpret a congressional statute in such a manner as to effectively nullify an entire section. See, *e. g.*, *Duncan*, 533 U. S., at 174 ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks omitted)). It is a strange principle that requires strict adherence to the text of one provision while allowing another to have virtually no real world application. It would seem far wiser to give *both* sections the meaning that Congress obviously intended.

Accordingly, while I concur in the judgment in *Graham County*, I respectfully dissent in *Dodd*.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

Essentially for reasons stated by JUSTICE STEVENS, I conclude that 28 U. S. C. § 2255, ¶ 6(3), is most sensibly read to start the time clock on the date a right is "made retroactively applicable to cases on collateral review." I therefore join, in principal part, Part II of JUSTICE STEVENS' dissenting opinion.*

[11] Again, it is possible that a combination of our decisions has effectively done this, see n. 8, *supra*, but we have never actually recognized an instance in which that has occurred.

*Petitioner and the Government assume, for the purpose at hand, that a controlling decision whether a right operates retroactively may be made by a court of appeals. See Tr. of Oral Arg. 5–7, 20, 24, 41; Brief for Petitioner 13–14, and n. 2, 25, and n. 5, 26–28; Brief for United States 17–18, and n. 5, 23. We have no cause in this case to question that assump-

The Court's interpretation—that the limitation period begins on "the date on which the right asserted was initially recognized by [this] Court," 28 U. S. C. § 2255, ¶ 6(3)—presents "a real risk that the 1-year limitation period will expire before [a § 2255 petitioner's] cause of action accrues," *ante*, at 364 (STEVENS, J., dissenting). By contrast, as JUSTICE BREYER explains in his dissenting opinion in *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, *post*, at 427–428, a determination that the False Claims Act's six-year statute of limitations, see 31 U. S. C. § 3731(b)(1), governs civil suits for retaliation under the Act, see § 3730(h), ordinarily would work no claim deprivation. See *ante*, at 366–367 (STEVENS, J., dissenting) (In *Graham County*, "the possibility that the 6-year statute of limitations period could run before the cause of action accrued, while plausible, was not particularly likely, since in most cases the retaliatory conduct that would form the basis of the cause of action under 31 U. S. C. § 3730(h) would probably occur within six years of the violation of § 3729. [In cases like *Dodd*, on the other hand,] owing to the substantially shorter 1-year statute of limitations period, both requirements of 28 U. S. C. § 2255, ¶ 6(3), will often not be met before the statute of limitations period has expired if it is triggered by the decision of the Supreme Court announcing a new rule." (footnote omitted)).

Nearly 20 years have passed since Congress amended 31 U. S. C. § 3731(b)(1) to provide that "[a] civil action under section 3730 may not be brought . . . more than 6 years after the date on which the violation of section 3729 is committed." See *Graham County*, *post*, at 412–413. Yet petitioner Graham County District has been unable to cite a single instance in which a suit has been time barred because the alleged

---

tion. I therefore do not subscribe to JUSTICE STEVENS' statements that only this Court has the prerogative to make the retroactivity determination. See *ante*, at 365–366, n. 4. I would await full adversarial presentation before expressing an opinion on that issue.

retaliation proscribed by § 3730(h) fell outside the period triggered by submission of a false claim in violation of § 3729. See Tr. of Oral Arg. in No. 04–169, pp. 4–6; Brief for Respondent in No. 04–169, pp. 4, 15–16; Brief for United States as *Amicus Curiae* in No. 04–169, pp. 27–28; see also *Graham County*, *post*, at 427 (BREYER, J., dissenting). As Dodd's case illustrates, however, on the Court's reading, it is "highly probable" that the 28 U. S. C. § 2255, ¶ 6(3), limitation "would bar relief before the claim can be brought." *Ante*, at 368–369 (STEVENS, J., dissenting). Accordingly, I would not, as JUSTICE STEVENS does, bracket the instant case with *Graham County*.

True, the limitation period in *Graham County*, like the § 2255, ¶ 6(3), limitation, is triggered by an event that may precede the accrual date of a claim. But the resemblance ends there. The generous six-year span in 31 U. S. C. § 3731(b)(1), in practical effect, will give the plaintiff leeway to commence suit she likely will not have under the typically shorter state limitation. See *Graham County*, *post*, at 427 (BREYER, J., dissenting). The opposite effect would attend 28 U. S. C. § 2255, ¶ 6(3). The one-year limitation specified there, if triggered by the date on which this Court "initially recognized" the right asserted, bars Dodd and will bar most "new rule" petitioners from presenting their claims. It exalts form over reality to equate the two statutes and cases for time-bar purposes.

Syllabus

ROMPILLA *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04–5462. Argued January 18, 2005—Decided June 20, 2005

Petitioner Rompilla was convicted of murder and other crimes. During the penalty phase, the jury found the aggravating factors that the murder was committed during a felony, that it was committed by torture, and that Rompilla had a significant history of felony convictions indicating the use or threat of violence. In mitigation, five members of Rompilla's family beseeched the jury for mercy. He was sentenced to death, and the Pennsylvania Supreme Court affirmed. His new lawyers filed for state postconviction relief, claiming ineffective assistance by his trial counsel in failing to present significant mitigating evidence about Rompilla's childhood, mental capacity and health, and alcoholism. The state courts found that trial counsel had sufficiently investigated the mitigation possibilities. Rompilla then raised inadequate representation in a federal habeas petition. The District Court found that the State Supreme Court had unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668, concluding that trial counsel had not investigated obvious signs that Rompilla had a troubled childhood and suffered from mental illness and alcoholism, unjustifiably relying instead on Rompilla's own description of an unexceptional background. In reversing, the Third Circuit found nothing unreasonable in the state court's application of *Strickland*, given defense counsel's efforts to uncover mitigation evidence from Rompilla, certain family members, and three mental health experts. The court distinguished *Wiggins* v. *Smith*, 539 U. S. 510—in which counsel had failed to investigate adequately to the point of ignoring the leads their limited enquiry yielded—noting that, although trial counsel did not unearth useful information in Rompilla's school, medical, police, and prison records, their investigation had gone far enough to give them reason to think that further efforts would not be a wise use of their limited resources.

Held: Even when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase. Pp. 380–393.

Syllabus

(a) Rompilla's entitlement to federal habeas relief turns on showing that the state court's resolution of his ineffective-assistance claim under *Strickland* "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court, 28 U. S. C. §2254(d)(1). The state court's result must be not only incorrect but also objectively unreasonable. *Wiggins, supra*, at 520–521. In judging the defense's investigation in preparing for a capital trial's sentencing phase, hindsight is discounted by pegging adequacy to "counsel's perspective at the time" investigative decisions were made and by giving deference to counsel's judgments. *Strickland, supra*, at 689, 691. Pp. 380–381.

(b) Here, the lawyers were deficient in failing to examine the court file on Rompilla's prior rape and assault conviction. They knew that the Commonwealth intended to seek the death penalty by proving that Rompilla had a significant history of felony convictions indicating the use or threat of violence, that it would attempt to establish this history by proving the prior conviction, and that it would emphasize his violent character by introducing a transcript of the rape victim's trial testimony. Although the prior conviction file was a public record, readily available at the courthouse where Rompilla was to be tried, counsel looked at no part of it until warned by the prosecution a second time, and even then did not examine the entire file. With every effort to view the facts as a defense lawyer would have at the time, it is difficult to see how counsel could have failed to realize that not examining the file would seriously compromise their opportunity to respond to an aggravation case. Their duty to make all reasonable efforts to learn what they could about the offense the prosecution was going to use certainly included obtaining the Commonwealth's own readily available file to learn what it knew about the crime, to discover any mitigating evidence it would downplay, and to anticipate the details it would emphasize. The obligation to examine the file was particularly pressing here because the violent prior offense was similar to the crime charged and because Rompilla's sentencing strategy stressed residual doubt. This obligation is not just common sense, but is also described in the American Bar Association Standards for Criminal Justice, which are "'guides to determining what is reasonable,'" *Wiggins, supra*, at 524. The state court's conclusion that defense counsel's efforts to find mitigating evidence by other means were enough to free them from further enquiry fails to answer the considerations set out here, to the point of being objectively unreasonable. No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations what they recalled. Nor would a reasonable lawyer compare possible searches for school reports, juvenile records, and evidence of drinking habits to the

opportunity to take a look at a file disclosing what the prosecutor knows and plans to read from in his case. Pp. 381–390.

(c) Because the state courts found counsel's representation adequate, they never reached the prejudice element of a *Strickland* claim, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different," 466 U. S., at 694. A *de novo* examination of this element shows that counsel's lapse was prejudicial. Had they looked at the prior conviction file, they would have found a range of mitigation leads that no other source had opened up. The imprisonment records contained in that file pictured Rompilla's childhood and mental health very differently from anything they had seen or heard. The accumulated entries—*e. g.*, that Rompilla had a series of incarcerations, often related to alcohol; and test results that would have pointed the defense's mental health experts to schizophrenia and other disorders—would have destroyed the benign conception of Rompilla's upbringing and mental capacity counsel had formed from talking to five family members and from the mental health experts' reports. Further effort would presumably have unearthed much of the material postconviction counsel found. Alerted to the school, medical, and prison records that trial counsel never saw, postconviction counsel found red flags pointing up a need for further testing, which revealed organic brain damage and childhood problems probably related to fetal alcohol syndrome. These findings in turn would probably have prompted a look at easily available school and juvenile records, which showed additional problems, including evidence of a highly abusive home life. The evidence adds up to a mitigation case bearing no relation to the few naked pleas for mercy actually put before the jury. The undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins, supra*, at 538, and the likelihood of a different result had the evidence gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland, supra*, at 694. Pp. 390–393.

355 F. 3d 233, reversed.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 393. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 396.

Billy H. Nolas argued the cause for petitioner. With him on the briefs was *Maureen Kearney Rowley*.

Amy Zapp, Chief Deputy Attorney General of Pennsylvania, argued the cause for respondent. With her on the brief were *Gerald J. Pappert*, Attorney General, *Richard A. Sheetz, Jr.*, Executive Deputy Attorney General, and *James B. Martin*.

Traci L. Lovitt argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben*.*

JUSTICE SOUTER delivered the opinion of the Court.

This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment. We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

I

On the morning of January 14, 1988, James Scanlon was discovered dead in a bar he ran in Allentown, Pennsylvania, his body having been stabbed repeatedly and set on fire. Ronald Rompilla was indicted for the murder and related offenses, and the Commonwealth gave notice of intent to ask

---

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert J. Grey, Jr.*, *Terri L. Mascherin*, and *Jared O. Freedman*; and for the Friends of Ronald A. Rompilla by *James Joseph Lynch, Jr.*

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

Audrey J. Anderson, *Christopher M. Miller*, and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

for the death penalty. Two public defenders were assigned to the case.

The jury at the guilt phase of trial found Rompilla guilty on all counts, and during the ensuing penalty phase, the prosecutor sought to prove three aggravating factors to justify a death sentence: that the murder was committed in the course of another felony; that the murder was committed by torture; and that Rompilla had a significant history of felony convictions indicating the use or threat of violence. See 42 Pa. Cons. Stat. §§ 9711(d)(6), (8), (9) (2002). The Commonwealth presented evidence on all three aggravators, and the jury found all proven. Rompilla's evidence in mitigation consisted of relatively brief testimony: five of his family members argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla's 14-year-old son testified that he loved his father and would visit him in prison. The jury acknowledged this evidence to the point of finding, as two factors in mitigation, that Rompilla's son had testified on his behalf and that rehabilitation was possible. But the jurors assigned the greater weight to the aggravating factors, and sentenced Rompilla to death. The Supreme Court of Pennsylvania affirmed both conviction and sentence. *Commonwealth* v. *Rompilla*, 539 Pa. 499, 653 A. 2d 626 (1995).

In December 1995, with new lawyers, Rompilla filed claims under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9541 *et seq.* (2004), including ineffective assistance by trial counsel in failing to present significant mitigating evidence about Rompilla's childhood, mental capacity and health, and alcoholism. The postconviction court found that trial counsel had done enough to investigate the possibilities of a mitigation case, and the Supreme Court of Pennsylvania affirmed the denial of relief. *Commonwealth* v. *Rompilla*, 554 Pa. 378, 721 A. 2d 786 (1998).

Rompilla then petitioned for a writ of habeas corpus under 28 U. S. C. §2254 in Federal District Court, raising claims that included inadequate representation. The District Court found that the State Supreme Court had unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668 (1984), as to the penalty phase of the trial, and granted relief for ineffective assistance of counsel. The court found that in preparing the mitigation case the defense lawyers had failed to investigate "pretty obvious signs" that Rompilla had a troubled childhood and suffered from mental illness and alcoholism, and instead had relied unjustifiably on Rompilla's own description of an unexceptional background. *Rompilla* v. *Horn*, No. CIV.A.99–737 (ED Pa., July 11, 2000), App. 1307–1308.

A divided Third Circuit panel reversed. *Rompilla* v. *Horn*, 355 F. 3d 233 (2004). The majority found nothing unreasonable in the state court's application of *Strickland*, given defense counsel's efforts to uncover mitigation material, which included interviewing Rompilla and certain family members, as well as consultation with three mental health experts. Although the majority noted that the lawyers did not unearth the "useful information" to be found in Rompilla's "school, medical, police, and prison records," it thought the lawyers were justified in failing to hunt through these records when their other efforts gave no reason to believe the search would yield anything helpful. 355 F. 3d, at 252. The panel thus distinguished Rompilla's case from *Wiggins* v. *Smith*, 539 U. S. 510 (2003). Whereas Wiggins's counsel failed to investigate adequately, to the point even of ignoring the leads their limited enquiry yielded, the Court of Appeals saw the Rompilla investigation as going far enough to leave counsel with reason for thinking further efforts would not be a wise use of the limited resources they had. But Judge Sloviter's dissent stressed that trial counsel's failure to obtain relevant records on Rompilla's background was owing to the lawyers' unreasonable reliance on

family members and medical experts to tell them what records might be useful. The Third Circuit denied rehearing en banc by a vote of 6 to 5. *Rompilla* v. *Horn*, 359 F. 3d 310 (2004).

We granted certiorari, 542 U. S. 966 (2004), and now reverse.[1]

II

Under 28 U. S. C. § 2254, Rompilla's entitlement to federal habeas relief turns on showing that the state court's resolution of his claim of ineffective assistance of counsel under *Strickland* v. *Washington*, *supra*, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1). An "unreasonable application" occurs when a state court "'identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins* v. *Smith*, *supra*, at 520 (quoting *Williams* v. *Taylor*, 529 U. S. 362, 413 (2000) (opinion of O'CONNOR, J.)). That is, "the state court's decision must have been [not only] incorrect or erroneous [but] objectively unreasonable." *Wiggins* v. *Smith*, *supra*, at 520–521 (quoting *Williams* v. *Taylor*, *supra*, at 409 (internal quotation marks omitted)).

Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, 466 U. S., at 687, with performance being measured against an "objective standard of reasonableness," *id.*, at 688, "under prevailing professional norms," *ibid.*; *Wiggins* v. *Smith*, *supra*, at 521. This case, like some others recently, looks to norms of adequate investigation in preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the

[1] Because we reverse on ineffective-assistance grounds, we have no occasion to consider Rompilla's other claim, under *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). It is enough to say that any retrial of Rompilla's sentence will be governed by the *Simmons* line of cases.

State's evidence of aggravated culpability with evidence in mitigation. In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to "counsel's perspective at the time" investigative decisions are made, 466 U. S., at 689, and by giving a "heavy measure of deference to counsel's judgments," *id.*, at 691.

A

A standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules, and the merits of a number of counsel's choices in this case are subject to fair debate. This is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase. None of the sources proved particularly helpful.

Rompilla's own contributions to any mitigation case were minimal. Counsel found him uninterested in helping, as on their visit to his prison to go over a proposed mitigation strategy, when Rompilla told them he was "bored being here listening" and returned to his cell. App. 668. To questions about childhood and schooling, his answers indicated they had been normal, *ibid.*, save for quitting school in the ninth grade, *id.*, at 677. There were times when Rompilla was even actively obstructive by sending counsel off on false leads. *Id.*, at 663–664.

The lawyers also spoke with five members of Rompilla's family (his former wife, two brothers, a sister-in-law, and his son), *id.*, at 494, and counsel testified that they developed a good relationship with the family in the course of their representation, *id.*, at 669, 729. The state postconviction court found that counsel spoke to the relatives in a "detailed manner," attempting to unearth mitigating information, *id.*, at 264, although the weight of this finding is qualified by the

lawyers' concession that "the overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody," *id.*, at 495; see also *id.*, at 669. Defense counsel also said that because the family was "coming from the position that [Rompilla] was innocent . . . they weren't looking for reasons for why he might have done this." *Id.*, at 494.

The third and final source tapped for mitigating material was the cadre of three mental health witnesses who were asked to look into Rompilla's mental state as of the time of the offense and his competency to stand trial. *Id.*, at 473–474, 476. But their reports revealed "nothing useful" to Rompilla's case, *id.*, at 1358, and the lawyers consequently did not go to any other historical source that might have cast light on Rompilla's mental condition.

When new counsel entered the case to raise Rompilla's postconviction claims, however, they identified a number of likely avenues the trial lawyers could fruitfully have followed in building a mitigation case. School records are one example, which trial counsel never examined in spite of the professed unfamiliarity of the several family members with Rompilla's childhood, and despite counsel's knowledge that Rompilla left school after the ninth grade. *Id.*, at 677. Other examples are records of Rompilla's juvenile and adult incarcerations, which counsel did not consult, although they were aware of their client's criminal record. And while counsel knew from police reports provided in pretrial discovery that Rompilla had been drinking heavily at the time of his offense, Lodging to App. 111–120 (hereinafter Lodging), and although one of the mental health experts reported that Rompilla's troubles with alcohol merited further investigation, App. 723–724, counsel did not look for evidence of a history of dependence on alcohol that might have extenuating significance.

Before us, trial counsel and the Commonwealth respond to these unexplored possibilities by emphasizing this Court's

recognition that the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. See *Wiggins* v. *Smith*, 539 U. S., at 525 (further investigation excusable where counsel has evidence suggesting it would be fruitless); *Strickland* v. *Washington*, *supra*, at 699 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987) (limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information). The Commonwealth argues that the information trial counsel gathered from Rompilla and the other sources gave them sound reason to think it would have been pointless to spend time and money on the additional investigation espoused by postconviction counsel, and we can say that there is room for debate about trial counsel's obligation to follow at least some of those potential lines of enquiry. There is no need to say more, however, for a further point is clear and dispositive: the lawyers were deficient in failing to examine the court file on Rompilla's prior conviction.

B

There is an obvious reason that the failure to examine Rompilla's prior conviction file fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial. App. 665–666. There is no question that defense counsel were on notice, since they acknowledge that a "plea letter," written by one of them four days

prior to trial, mentioned the prosecutor's plans. *Ibid.* It is also undisputed that the prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried.

It is clear, however, that defense counsel did not look at any part of that file, including the transcript, until warned by the prosecution a second time. In a colloquy the day before the evidentiary sentencing phase began, the prosecutor again said he would present the transcript of the victim's testimony to establish the prior conviction.

> "[DEFENSE]: I would also like to review whatever he's going to read from.
>
> "[PROSECUTOR]: Well, I told you that I was going to do this a long time ago. You certainly had the opportunity to review the Transcript.
>
> . . . . . .
>
> "[DEFENSE]: Well, I would like a copy of this.
>
> "[PROSECUTOR]: I don't think that's my duty to provide you with a copy. That's a public record, and you could have gotten that Transcript at any time prior to this Trial. I made one copy for myself, and I'd like to have it now.
>
> "[DEFENSE]: Well, Judge, then I'm going to need to get a copy of it. I'm going to need to get a copy of it." *Id.*, at 32, 36.[2]

---

[2] A similar exchange took place at the same hearing about the indictment in the record of Rompilla's prior conviction.

"[DEFENSE]: Well, I think we need to look at the Indictment then. If he's charged with committing the Burglary-

. . . . . .

"[PROSECUTOR]: I had a copy, and I forgot to bring it up with me.

"[COURT]: All right.

"[DEFENSE]: Can we see it, Judge?

"[COURT]: Sure, he's going to get it.

"[PROSECUTOR]: It's a public record . . . you could have gone over *[sic]* lunch and looked at it just like I did." App. 28.

At the postconviction evidentiary hearing, Rompilla's lawyer confirmed that she had not seen the transcript before the hearing in which this exchange took place, *id.*, at 506–507, and crucially, even after obtaining the transcript of the victim's testimony on the eve of the sentencing hearing, counsel apparently examined none of the other material in the file.[3]

With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating

---

[3] Defense counsel also stated at the postconviction hearing that she believed at some point she had looked at some files regarding that prior conviction and that she was familiar with the particulars of the case. But she could not recall what the files were or how she obtained them. *Id.*, at 507–508. In addition, counsel apparently obtained Rompilla's rap sheet, which showed that he had prior convictions, including the one for rape. *Id.*, at 664. At oral argument, the United States, arguing as an *amicus* in support of Pennsylvania, maintained that counsel had fulfilled their obligations to investigate the prior conviction by obtaining the rap sheet. Tr. of Oral Arg. 44–45. But this cannot be so. The rap sheet would reveal only the charges and dispositions, being no reasonable substitute for the prior conviction file. The dissent nonetheless concludes on this evidence that counsel knew all they needed to know about the prior conviction. *Post*, at 401 (opinion of KENNEDY, J.). Given counsel's limited investigation into the prior conviction, the dissent's parsing of the record seems generous to a fault.

evidence the Commonwealth would emphasize.[4] Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.[5]

---

[4] The ease with which counsel could examine the entire file makes application of this standard correspondingly easy. Suffice it to say that when the State has warehouses of records available in a particular case, review of counsel's performance will call for greater subtlety.

[5] This requirement answers the dissent's and the United States's contention that defense counsel provided effective assistance with regard to the prior conviction file because it argued that it would be prejudicial to allow the introduction of the transcript. *Post*, at 402; Brief for United States as *Amicus Curiae* 29. Counsel's obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out. As noted above, *supra* this page, counsel had no way of knowing the context of the transcript and the details of the prior conviction without looking at the file as a whole. Counsel could not effectively rebut the aggravation case or build their own case in mitigation.

Nor is there any merit to the United States's contention that further enquiry into the prior conviction file would have been fruitless because the sole reason the transcript was being introduced was to establish the aggravator that Rompilla had committed prior violent felonies. Brief for United States as *Amicus Curiae* 30. The Government maintains that because the transcript would incontrovertibly establish the fact that Rompilla had committed a violent felony, the defense could not have expected to rebut that aggravator through further investigation of the file. That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.

The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.).[6]

"[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" *Wiggins* v. *Smith*, 539 U. S., at 524 (quoting *Strickland* v. *Washington*, 466 U. S., at 688), and the Commonwealth has come up with no reason to think the quoted standard impertinent here.[7]

---

[6] The new version of the Standards now reads that any "investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities" whereas the version in effect at the time of Rompilla's trial provided that the "investigation" should always include such efforts. ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–4.1 (3d ed. 1993). We see no material difference between these two phrasings, and in any case cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.

[7] In 1989, shortly after Rompilla's trial, the ABA promulgated a set of guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter 1989

At argument the most that Pennsylvania (and the United States as *amicus*) could say was that defense counsel's efforts to find mitigating evidence by other means excused them from looking at the prior conviction file. Tr. of Oral Arg. 37–39, 45–46. And that, of course, is the position taken by the state postconviction courts. Without specifically discussing the prior case file, they too found that defense coun-

---

ABA Guidelines or Guideline). Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly forceful directive: "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports." Guideline 11.4.1.D.4. When the United States argues that Rompilla's defense counsel complied with these Guidelines, it focuses its attentions on a different Guideline, 11.4.1.D.2. Brief for United States as *Amicus Curiae* 20–21. Guideline 11.4.1.D.2 concerns practices for working with the defendant and potential witnesses, and the United States contends that it imposes no requirement to obtain any one particular type of record or information. *Ibid.* But this argument ignores the subsequent Guideline quoted above, which is in fact reprinted in the appendix to the United States's brief, that requires counsel to "'make efforts to secure information in the possession of the prosecution or law enforcement authorities.'" App. to *id.*, at 4a.

Later, and current, ABA Guidelines relating to death penalty defense are even more explicit:

"Counsel must . . . investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7, comment. (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1027 (2003) (footnotes omitted).

Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U. S., at 524 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'" (quoting 1989 ABA Guideline 11.4.1.C; emphasis in original)). For reasons given in the text, no such further investigation was needed to point to the reasonable duty to look in the file in question here.

sel's efforts were enough to free them from any obligation to enquire further. *Commonwealth* v. *Rompilla*, No. 682/1988 (Pa. Ct. Common Pleas, Aug. 23, 1996), App. 263–264, 272–273.

We think this conclusion of the state court fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion. It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking. No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony. Nor would a reasonable lawyer compare possible searches for school reports, juvenile records, and evidence of drinking habits to the opportunity to take a look at a file disclosing what the prosecutor knows and even plans to read from in his case. Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there. *E. g.*, *Strickland*, *supra*, at 699. But looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce.

The dissent thinks this analysis creates a "rigid, *per se*" rule that requires defense counsel to do a complete review of the file on any prior conviction introduced, *post*, at 404 (opinion of KENNEDY, J.), but that is a mistake. Counsel fell short here because they failed to make reasonable efforts to review the prior conviction file, despite knowing that the prosecution intended to introduce Rompilla's prior conviction not merely by entering a notice of conviction into evidence but by quoting damaging testimony of the rape victim in that case. The unreasonableness of attempting no more than they did was heightened by the easy availability of the file

at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt. It is owing to these circumstances that the state courts were objectively unreasonable in concluding that counsel could reasonably decline to make any effort to review the file. Other situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment.

C

Since counsel's failure to look at the file fell below the line of reasonable practice, there is a further question about prejudice, that is, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. Because the state courts found the representation adequate, they never reached the issue of prejudice, App. 265, 272–273, and so we examine this element of the *Strickland* claim *de novo*, *Wiggins* v. *Smith*, 539 U. S., at 534, and agree with the dissent in the Court of Appeals. We think Rompilla has shown beyond any doubt that counsel's lapse was prejudicial; Pennsylvania, indeed, does not even contest the claim of prejudice.

If the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up. In the same file with the transcript of the prior trial were the records of Rompilla's imprisonment on the earlier conviction, App. 508, 571, 631, which defense counsel testified she had never seen, *id.*, at 508. The prison files pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard. An evaluation by a corrections counselor states that Rompilla was "reared in the slum environment of Allentown, Pa. vicinity. He early came to [the] attention of juvenile authorities, quit

school at 16, [and] started a series of incarcerations in and out Penna. often of assaultive nature and commonly related to over-indulgence in alcoholic beverages." Lodging 40. The same file discloses test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling. *Id.*, at 32–35.[8]

The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts. With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case. Further effort would presumably have unearthed much of the material postconviction counsel found, including testimony from several members of Rompilla's family, whom trial counsel did not interview. Judge Sloviter summarized this evidence:

> "Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her preg-

[8] The dissent would ignore the opportunity to find this evidence on the ground that its discovery (and the consequent analysis of prejudice) "rests on serendipity," *post*, at 405. But once counsel had an obligation to examine the file, counsel had to make reasonable efforts to learn its contents; and once having done so, they could not reasonably have ignored mitigation evidence or red flags simply because they were unexpected. The dissent, however, assumes that counsel could reasonably decline even to read what was in the file, see *post*, at 406 (if counsel had reviewed the case file for mitigating evidence, "[t]here would have been no reason for counsel to read, or even to skim, this obscure document"). While that could well have been true if counsel had been faced with a large amount of possible evidence, see n. 4, *supra*, there is no indication that examining the case file in question here would have required significant labor. Indeed, Pennsylvania has conspicuously failed to contest Rompilla's claim that because the information was located in the prior conviction file, reasonable efforts would have led counsel to this information.

> nancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags." 355 F. 3d, at 279 (dissenting opinion) (citations omitted).

The jury never heard any of this and neither did the mental health experts who examined Rompilla before trial. While they found "nothing helpful to [Rompilla's] case," *Rompilla*, 554 Pa., at 385, 721 A. 2d, at 790, their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of "'red flags'" pointing up a need to test further. 355 F. 3d, at 279 (Sloviter, J., dissenting). When they tested, they found that Rompilla "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." *Ibid.* They also said that "Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Id.*, at 280 (Sloviter, J., dissenting).

These findings in turn would probably have prompted a look at school and juvenile records, all of them easy to get, showing, for example, that when Rompilla was 16 his mother "was missing from home frequently for a period of one or several weeks at a time." Lodging 44. The same report noted that his mother "has been reported . . . frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times." *Ibid.* School records showed Rompilla's IQ was in the mentally retarded range. *Id.*, at 11, 13, 15.

This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins* v. *Smith*, 539 U. S., at 538 (quoting *Williams* v. *Taylor*, 529 U. S., at 398), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U. S., at 694.

The judgment of the Third Circuit is reversed, and Pennsylvania must either retry the case on penalty or stipulate to a life sentence.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I write separately to put to rest one concern. The dissent worries that the Court's opinion "imposes on defense counsel a rigid requirement to review all documents in what it calls the 'case file' of any prior conviction that the prosecution might rely on at trial." *Post*, at 396 (opinion of KENNEDY, J.). But the Court's opinion imposes no such rule. See *ante*, at 389–390. Rather, today's decision simply ap-

plies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland* v. *Washington*, 466 U. S. 668 (1984). Trial counsel's performance in Rompilla's case falls short under that standard, because the attorneys' behavior was not "reasonable considering all the circumstances." *Id.*, at 688. In particular, there were three circumstances which made the attorneys' failure to examine Rompilla's prior conviction file unreasonable.

First, Rompilla's attorneys knew that their client's prior conviction would be at the very heart of the *prosecution's* case. The prior conviction went not to a collateral matter, but rather to one of the aggravating circumstances making Rompilla eligible for the death penalty. The prosecutors intended not merely to mention the fact of prior conviction, but to read testimony about the details of the crime. That crime, besides being quite violent in its own right, was very similar to the murder for which Rompilla was on trial, and Rompilla had committed the murder at issue a mere three months after his release from prison on the earlier conviction. In other words, the prosecutor clearly planned to use details of the prior crime as powerful evidence that Rompilla was a dangerous man for whom the death penalty would be both appropriate punishment and a necessary means of incapacitation. Cf. App. 165–166 (prosecutor's penalty-phase argument). This was evidence the defense should have been prepared to meet: A reasonable defense lawyer would have attached a high importance to obtaining the record of the prior trial, in order to anticipate and find ways of deflecting the prosecutor's aggravation argument.

Second, the prosecutor's planned use of the prior conviction threatened to eviscerate one of the *defense's* primary mitigation arguments. Rompilla was convicted on the basis of strong circumstantial evidence. His lawyers structured the entire mitigation argument around the hope of convincing the jury that residual doubt about Rompilla's guilt made

it inappropriate to impose the death penalty. In announcing an intention to introduce testimony about Rompilla's similar prior offense, the prosecutor put Rompilla's attorneys on notice that the prospective defense on mitigation likely would be ineffective and counterproductive. The similarities between the two crimes, combined with the timing and the already strong circumstantial evidence, raised a strong likelihood that the jury would reject Rompilla's residual doubt argument. Rompilla's attorneys' reliance on this transparently weak argument risked damaging their credibility. Such a scenario called for further investigation, to determine whether circumstances of the prior case gave any hope of saving the residual doubt argument, or whether the best strategy instead would be to jettison that argument so as to focus on other, more promising issues. Cf. *Yarborough* v. *Gentry*, 540 U. S. 1, 7 (2003) *(per curiam)*; *Bell* v. *Cone*, 535 U. S. 685, 700 (2002) (noting that sound tactical judgment may sometimes call for omitting certain defense evidence or arguments).

Third, the attorneys' decision not to obtain Rompilla's prior conviction file was not the result of an informed tactical decision about how the lawyers' time would best be spent. Although Rompilla's attorneys had ample warning that the details of Rompilla's prior conviction would be critical to their case, their failure to obtain that file would not necessarily have been deficient if it had resulted from the lawyers' careful exercise of judgment about how best to marshal their time and serve their client. But Rompilla's attorneys did not ignore the prior case file in order to spend their time on other crucial leads. They did not determine that the file was so inaccessible or so large that examining it would necessarily divert them from other trial-preparation tasks they thought more promising. They did not learn at the 11th hour about the prosecution's intent to use the prior conviction, when it was too late for them to change plans. Rather, their failure to obtain the crucial file "was the result of in-

attention, not reasoned strategic judgment." *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003). As a result, their conduct fell below constitutionally required standards. See *id.*, at 533 ("'[S]trategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'" (quoting *Strickland*, 466 U. S., at 690–691)).

In the particular circumstances of this case, the attorneys' failure to obtain and review the case file from their client's prior conviction did not meet standards of "reasonable professional judgmen[t]." *Id.*, at 691. Because the Court's opinion is consistent with the "'case-by-case examination of the evidence'" called for under our cases, *Williams* v. *Taylor*, 529 U. S. 362, 391 (2000), I join the opinion.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Today the Court brands two committed criminal defense attorneys as ineffective—"outside the wide range of professionally competent assistance," *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984)—because they did not look in an old case file and stumble upon something they had not set out to find. By implication the Court also labels incompetent the work done by the three mental health professionals who examined Ronald Rompilla. To reach this result, the majority imposes on defense counsel a rigid requirement to review all documents in what it calls the "case file" of any prior conviction that the prosecution might rely on at trial. The Court's holding, a mistake under any standard of review, is all the more troubling because this case arises under the Antiterrorism and Effective Death Penalty Act of 1996. In order to grant Rompilla habeas relief the Court must say, and indeed does say, that the Pennsylvania Supreme Court was objectively unreasonable in failing to anticipate today's new case file rule.

In my respectful submission it is this Court, not the state court, which is unreasonable. The majority's holding has no place in our Sixth Amendment jurisprudence and, if followed, often will result in less effective counsel by diverting limited defense resources from other important tasks in order to satisfy the Court's new *per se* rule. Finally, even if the Court could justify its distortion of *Strickland*, Rompilla still would not be entitled to relief. The Court is able to conclude otherwise only by ignoring the established principle that it is the defendant, not the State, who has the burden of demonstrating that he was prejudiced by any deficiency in his attorneys' performance.

These are the reasons for my dissent.

I

Under any standard of review the investigation performed by Rompilla's counsel in preparation for sentencing was not only adequate but also conscientious.

Rompilla's attorneys recognized from the outset that building an effective mitigation case was crucial to helping their client avoid the death penalty. App. 516, 576. Rompilla stood accused of a brutal crime. In January 1988, James Scanlon was murdered while he was closing the Cozy Corner Cafe, a bar he owned in Allentown, Pennsylvania. Scanlon's body was discovered later the next morning, lying in a pool of blood. Scanlon had been stabbed multiple times, including 16 wounds around the neck and head. Scanlon also had been beaten with a blunt object, and his face had been gashed, possibly with shards from broken liquor and beer bottles found at the scene of the crime. After Scanlon was stabbed to death his body had been set on fire.

Substantial evidence linked Rompilla to the crime. See generally *Commonwealth* v. *Rompilla*, 539 Pa. 499, 505–506, 653 A. 2d 626, 629–630 (1995). He was at the Cozy Corner Cafe near closing time on the night of the murder and was observed going to the bathroom approximately 10 times dur-

ing a 1-hour period. A window in that bathroom, the police later determined, was the probable point of entry used by Scanlon's assailant. A pair of Rompilla's sneakers seized by the police matched a bloody footprint found near the victim's body, and blood on the sneakers matched the victim's blood type. Rompilla's fingerprint was found on one of the two knives used to commit the murder. Sometime after leaving the bar on the night of the murder, Rompilla checked into a nearby motel under a false name. Although he told the police he left the bar with only two dollars, Rompilla had paid cash for the room and flashed a large amount of money to the desk clerks. The victim's wallet was discovered in the bushes just outside of Rompilla's motel room. When the police questioned Rompilla about the murder, his version of events was inconsistent with the testimony of other witnesses.

Rompilla was represented at trial by Fredrick Charles, the chief public defender for Lehigh County at the time, and Maria Dantos, an assistant public defender. Charles and Dantos were assisted by John Whispell, an investigator in the public defender's office. Rompilla's defense team sought to develop mitigating evidence from various sources. First, they questioned Rompilla extensively about his upbringing and background. App. 668–669. To make these conversations more productive they provided Rompilla with a list of the mitigating circumstances recognized by Pennsylvania law. *Id.*, at 657. Cf. *Strickland*, *supra*, at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable"). Second, Charles and Dantos arranged for Rompilla to be examined by three experienced mental health professionals, experts described by Charles as "the best forensic psychiatrist around here, [another] tremendous psychiatrist and a fabulous forensic psychologist." App. 672. Finally, Rompilla's attorneys ques-

tioned his family extensively in search of any information that might help spare Rompilla the death penalty. *Id.*, at 493–494, 557–558, 669–670, 729–730. Dantos, in particular, developed a "very close" relationship with Rompilla's family, which was a "constant source of information." *Id.*, at 557, 729. Indeed, after trial Rompilla's wife sent Dantos a letter expressing her gratitude. *Id.*, at 733. The letter referred to Charles and Dantos as "superb human beings" who "fought and felt everything [Rompilla's] family did." *Ibid.*

The Court acknowledges the steps taken by Rompilla's attorneys in preparation for sentencing but finds fault nonetheless. "[T]he lawyers were deficient," the Court says, "in failing to examine the court file on Rompilla's prior conviction." *Ante*, at 383.

The prior conviction the Court refers to is Rompilla's 1974 conviction for rape, burglary, and theft. See *Commonwealth* v. *Rompilla*, 250 Pa. Super. 139, 378 A. 2d 865 (1977). Before the sentencing phase of the capital case, the Commonwealth informed Rompilla's attorneys that it intended to use these prior crimes to prove one of the statutory aggravating circumstances—namely, that Rompilla had a "significant history of felony convictions involving the use or threat of violence to the person." 42 Pa. Cons. Stat. § 9711(d)(9) (2002). Rompilla's attorneys were on notice of the Commonwealth's plans, and from this the Court concludes that effective assistance of counsel required a review of the prior conviction case file.

A *per se* rule requiring counsel in every case to review the records of prior convictions used by the State as aggravation evidence is a radical departure from *Strickland* and its progeny. We have warned in the past against the creation of "specific guidelines" or "checklist[s] for judicial evaluation of attorney performance." 466 U. S., at 688. See also *Wiggins* v. *Smith*, 539 U. S. 510, 521 (2003); *Roe* v. *Flores-Ortega*, 528 U. S. 470, 477 (2000). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of

the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U. S., at 688–689 (citations omitted). For this reason, while we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been careful to say these standards "are only guides" and do not establish the constitutional baseline for effective assistance of counsel. *Ibid.* The majority, by parsing the guidelines as if they were binding statutory text, ignores this admonition.

The majority's analysis contains barely a mention of *Strickland* and makes little effort to square today's holding with our traditional reluctance to impose rigid requirements on defense counsel. While the Court disclaims any intention to create a bright-line rule, *ante*, at 389–390; see also *ante*, at 393–394 (O'CONNOR, J., concurring), this affords little comfort. The Court's opinion makes clear it has imposed on counsel a broad obligation to review prior conviction case files where those priors are used in aggravation—and to review every document in those files if not every single page of every document, regardless of the prosecution's proposed use for the prior conviction. *Infra*, at 403, 407–408. One Member of the majority tries to limit the Court's new rule by arguing that counsel's decision here was "not the result of an informed tactical decision," *ante*, at 395 (O'CONNOR, J., concurring), but the record gives no support for this notion. The Court also protests that the exceptional weight Rompilla's attorneys at sentencing placed on residual doubt required them to review the prior conviction file, *ante*, at 389–390; *ante*, at 394–395 (O'CONNOR, J., concurring). In fact,

residual doubt was not central to Rompilla's mitigation case. Rompilla's family members did testify at sentencing that they thought he was innocent, but Dantos tried to draw attention away from this point and instead use the family's testimony to humanize Rompilla and ask for mercy. App. 123–149.

The majority also disregards the sound strategic calculation supporting the decisions made by Rompilla's attorneys. Charles and Dantos were "aware of [Rompilla's] priors" and "aware of the circumstances" surrounding these convictions. *Id.*, at 507. At the postconviction hearing, Dantos also indicated that she had reviewed documents relating to the prior conviction. *Ibid.* Based on this information, as well as their numerous conversations with Rompilla and his family, Charles and Dantos reasonably could conclude that reviewing the full prior conviction case file was not the best allocation of resources.

The majority concludes otherwise only by ignoring *Strickland*'s command that "[j]udicial scrutiny of counsel's performance must be highly deferential." 466 U. S., at 689. According to the Court, the Constitution required nothing less than a full review of the prior conviction case file by Rompilla's attorneys. Even with the benefit of hindsight the Court struggles to explain how the file would have proved helpful, offering only the vague speculation that Rompilla's attorneys might have discovered "circumstances extenuating the behavior described by the [rape] victim." *Ante*, at 386. What the Court means by "circumstances" is a mystery. If the Court is referring to details on Rompilla's mental fitness or upbringing, surely Rompilla's attorneys were more likely to discover such information through the sources they consulted: Rompilla, his family, and the three mental health experts that examined him.

Perhaps the circumstances to which the majority refers are the details of Rompilla's 1974 crimes. Charles and Dantos, however, had enough information about the prior

convictions to determine that reviewing the case file was not the most effective use of their time. Rompilla had been convicted of breaking into the residence of Josephine Macrenna, who lived in an apartment above the bar she owned. App. 56–89. After Macrenna gave him the bar's receipts for the night, Rompilla demanded that she disrobe. When she initially resisted, Rompilla slashed her left breast with a knife. Rompilla then held Macrenna at knifepoint while he raped her for over an hour. Charles and Dantos were aware of these circumstances of the prior conviction and the brutality of the crime. *Id.*, at 507. It did not take a review of the case file to know that quibbling with the Commonwealth's version of events was a dubious trial strategy. At sentencing Dantos fought vigorously to prevent the Commonwealth from introducing the details of the 1974 crimes, *id.*, at 16–40, but once the transcript was admitted there was nothing that could be done. Rompilla was unlikely to endear himself to the jury by arguing that his prior conviction for burglary, theft, and rape really was not as bad as the Commonwealth was making it out to be. Recognizing this, Rompilla's attorneys instead devoted their limited time and resources to developing a mitigation case. That those efforts turned up little useful evidence does not make the *ex ante* strategic calculation of Rompilla's attorneys constitutionally deficient.

One of the primary reasons this Court has rejected a checklist approach to effective assistance of counsel is that each new requirement risks distracting attorneys from the real objective of providing vigorous advocacy as dictated by the facts and circumstances in the particular case. The Court's rigid requirement that counsel always review the case files of convictions the prosecution seeks to use at trial will be just such a distraction. Capital defendants often have a history of crime. For example, as of 2003, 64 percent of inmates on death row had prior felony convictions. U. S. Dept. of Justice, Bureau of Justice Statistics, T. Bonczar & T. Snell, Capital Punishment, 2003, p. 8 (Nov. 2004), available

at http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf (as visited June 16, 2005, and available in Clerk of Court's case file). If the prosecution relies on these convictions as aggravators, the Court has now obligated defense attorneys to review the boxes of documents that come with them.

In imposing this new rule, the Court states that counsel in this case could review the "entire file" with "ease." *Ante*, at 386, n. 4. There is simply no support in the record for this assumption. Case files often comprise numerous boxes. The file may contain, among other things, witness statements, forensic evidence, arrest reports, grand jury transcripts, testimony and exhibits relating to any pretrial suppression hearings, trial transcripts, trial exhibits, post-trial motions, and presentence reports. Full review of even a single prior conviction case file could be time consuming, and many of the documents in a file are duplicative or irrelevant. The Court, recognizing the flaw in its analysis, suggests that cases involving "warehouses of records" "will call for greater subtlety." *Ibid.* Yet for all we know, this is such a case. As to the time component, the Court tells us nothing as to the number of hours counsel had available to prepare for sentencing or why the decisions they made in allocating their time were so flawed as to constitute deficient performance under *Strickland*.

Today's decision will not increase the resources committed to capital defense. (At the time of Rompilla's trial, the Lehigh County Public Defender's Office had two investigators for 2,000 cases. App. 662.) If defense attorneys dutifully comply with the Court's new rule, they will have to divert resources from other tasks. The net effect of today's holding in many cases—instances where trial counsel reasonably can conclude that reviewing old case files is not an effective use of time—will be to diminish the quality of representation. We have "consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation," *Roe* v. *Flores-Ortega*, 528 U. S., at 481; I see

no occasion to depart from this approach in order to impose a requirement that might well lead to worse representation.

It is quite possible defense attorneys, recognizing the absurdity of a one-size-fits-all approach to effective advocacy, will simply ignore the Court's new requirement and continue to exercise their best judgment about how to allocate time and resources in preparation for trial. While this decision would be understandable—and might even be required by state ethical rules, cf. Pa. Rules of Professional Conduct, Preamble, and Rule 1.1 (2005)—it leaves open the possibility that a defendant will seek to overturn his conviction based on something in a prior conviction case file that went unreviewed. This elevation of needle-in-a-haystack claims to the status of constitutional violations will benefit undeserving defendants and saddle States with the considerable costs of retrial and/or resentencing.

Today's decision is wrong under any standard, but the Court's error is compounded by the fact that this case arises on federal habeas. The Pennsylvania Supreme Court adjudicated Rompilla's ineffective-assistance-of-counsel claim on the merits, and this means 28 U. S. C. § 2254(d)'s deferential standard of review applies. Rompilla must show that the Pennsylvania Supreme Court decision was not just "incorrect or erroneous," but "objectively unreasonable." *Lockyer* v. *Andrade*, 538 U. S. 63, 75 (2003) (citing *Williams* v. *Taylor*, 529 U. S. 362, 410, 412 (2000)). He cannot do so.

The Court pays lipservice to the *Williams* standard, but it proceeds to adopt a rigid, *per se* obligation that binds counsel in every case and finds little support in our precedents. Indeed, *Strickland*, the case the Court purports to apply, is directly to the contrary: "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules." 466 U. S., at 696. The Pennsylvania Supreme Court gave careful consideration to Rompilla's Sixth Amendment claim and concluded that "counsel reasonably

relied upon their discussions with [Rompilla] and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances." *Commonwealth* v. *Rompilla*, 554 Pa. 378, 385–386, 721 A. 2d 786, 790 (1998). This decision was far from unreasonable. The Pennsylvania courts can hardly be faulted for failing to anticipate today's abrupt departure from *Strickland*.

We have reminded federal courts often of the need to show the requisite level of deference to state-court judgments under 28 U. S. C. §2254(d). *Holland* v. *Jackson*, 542 U. S. 649 (2004) *(per curiam)*; *Middleton* v. *McNeil*, 541 U. S. 433 (2004) *(per curiam)*; *Yarborough* v. *Gentry*, 540 U. S. 1 (2003) *(per curiam)*; *Mitchell* v. *Esparza*, 540 U. S. 12 (2003) *(per curiam)*; *Early* v. *Packer*, 537 U. S. 3 (2002) *(per curiam)*; *Woodford* v. *Visciotti*, 537 U. S. 19 (2002) *(per curiam)*. By ignoring our own admonition today, the Court adopts a do-as-we-say, not-as-we-do approach to federal habeas review.

II

Even accepting the Court's misguided analysis of the adequacy of representation by Rompilla's trial counsel, Rompilla is still not entitled to habeas relief. *Strickland* assigns the defendant the burden of demonstrating prejudice, 466 U. S., at 692. Rompilla cannot satisfy this standard, and only through a remarkable leap can the Court conclude otherwise.

The Court's theory of prejudice rests on serendipity. Nothing in the old case file diminishes the aggravating nature of the prior conviction. The only way Rompilla's attorneys could have minimized the aggravating force of the earlier rape conviction was through Dantos' forceful, but ultimately unsuccessful, fight to exclude the transcript at sentencing. The Court, recognizing this problem, instead finds prejudice through chance. If Rompilla's attorneys had reviewed the case file of his prior rape and burglary conviction, the Court says, they would have stumbled across "a range of mitigation leads." *Ante*, at 390.

The range of leads to which the Court refers is in fact a handful of notations within a single 10-page document. The document, an "Initial Transfer Petition," appears to have been prepared by the Pennsylvania Department of Corrections after Rompilla's conviction to facilitate his initial assignment to one of the Commonwealth's maximum-security prisons. Lodging to App. 31–40.

Rompilla cannot demonstrate prejudice because nothing in the record indicates that Rompilla's trial attorneys would have discovered the transfer petition, or the clues contained in it, if they had reviewed the old file. The majority faults Rompilla's attorneys for failing to "learn what the Commonwealth knew about the crime," "discover any mitigating evidence the Commonwealth would downplay," and "anticipate the details of the aggravating evidence the Commonwealth would emphasize." *Ante*, at 385–386. Yet if Rompilla's attorneys had reviewed the case file with these purposes in mind, they almost surely would have attributed no significance to the transfer petition following only a cursory review. The petition, after all, was prepared by the Department of Corrections after Rompilla's conviction for the purpose of determining Rompilla's initial prison assignment. It contained no details regarding the circumstances of the conviction. Reviewing the prior conviction file for information to counter the Commonwealth, counsel would have looked first at the transcript of the trial testimony, and perhaps then to probative exhibits or forensic evidence. There would have been no reason for counsel to read, or even to skim, this obscure document.

The Court claims that the transfer petition would have been discovered because it was in the "same file" with the transcript, *ante*, at 391, but this characterization is misleading and the conclusion the Court draws from it is accordingly fallacious. The record indicates only that the transfer petition was a part of the same case file, but Rompilla provides no indication of the size of the file, which for all we know

originally comprised several boxes of documents. App. 508, 571, 631. By the time of Rompilla's state postconviction hearing, moreover, the transfer petition was not stored in any "file" at all—it had been transferred to microfilm. *Id.*, at 461. The Court implies in a footnote that prejudice can be presumed because "Pennsylvania has conspicuously failed to contest Rompilla's" inevitable-discovery argument. *Ante*, at 391, n. 8. The Commonwealth's strategy is unsurprising given that discussion of the prior conviction case file takes up only one paragraph of Rompilla's argument, Brief for Petitioner 35–36, but it is also irrelevant. It is well established that Rompilla, not the Commonwealth, has the burden of establishing prejudice. *Strickland*, *supra*, at 694.

The majority thus finds itself in a bind. If counsel's alleged deficiency lies in the failure to review the file for the purposes the majority has identified, then there is no prejudice: for there is no reasonable probability that review of the file for those purposes would have led counsel to accord the transfer petition enough attention to discover the leads the majority cites. Prejudice could only be demonstrated if the deficiency in counsel's performance were to be described not as the failure to perform a purposive review of the file, but instead as the failure to accord intense scrutiny to every single page of every single document in that file, regardless of the purpose motivating the review. At times, the Court hints that its new obligation on counsel sweeps this broadly. See *ante*, at 386, n. 4 ("[t]he ease with which counsel could examine the entire file . . . "); *ante*, at 386, n. 5 ("[C]ounsel had no way of knowing the context of the transcript and the details of the prior conviction without looking at the file as a whole"). Surely, however, the Court would not require defense counsel to look at every document, no matter how tangential, included in the prior conviction file on the off chance that some notation therein might provide a lead, which in turn might result in the discovery of useful information. The Constitution does not mandate that defense attor-

neys perform busy work. This rigid requirement would divert counsel's limited time and energy away from more important tasks. In this way, it would ultimately disserve the rationale underlying the Court's new rule, which is to ensure that defense counsel counter the State's aggravation case effectively.

If the Court does intend to impose on counsel a constitutional obligation to review every page of every document included in the case file of a prior conviction, then today's holding is even more misguided than I imagined.

* * *

Strickland anticipated the temptation "to second-guess counsel's assistance after conviction or adverse sentence" and cautioned that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. Today, the Court succumbs to the very temptation that *Strickland* warned against. In the process, the majority imposes on defense attorneys a rigid requirement that finds no support in our cases or common sense.

I would affirm the judgment of the Court of Appeals.

Syllabus

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES EX REL. WILSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04–169. Argued April 20, 2005—Decided June 20, 2005

The False Claims Act (FCA) prohibits a person from making false or fraudulent claims for payment to the United States. 31 U. S. C. § 3729(a). That prohibition may be enforced in suits filed by the Attorney General, § 3730(a), and in *qui tam* actions brought by private individuals in the Government's name, § 3730(b)(1). A 1986 amendment to the FCA created a private cause of action for an individual retaliated against by his employer for assisting an FCA investigation or proceeding, § 3730(h), and revised the FCA's statute of limitations, § 3731(b). Section 3731(b) provides that "[a] civil action under section 3730 may not be brought . . . more than 6 years after the date on which the violation of section 3729 is committed." In 2001, relator Wilson brought an FCA *qui tam* action against petitioners, along with an FCA retaliation claim. Petitioner Graham County Soil and Water Conservation District employed Wilson as a secretary. Wilson alleged that petitioner county officials retaliated against her for alerting federal officials to the purported fraud and for cooperating with the ensuing investigation, ultimately forcing her 1997 resignation from the district. Petitioners successfully moved to dismiss the retaliation claim as untimely, on the ground that North Carolina's 3-year statute of limitations governed Wilson's FCA action and barred it. Reversing, the Fourth Circuit found it unnecessary to borrow a state limitations period because one was supplied by § 3731(b)(1).

Held: Section 3731(b)(1)'s limitations period does not govern § 3730(h) retaliation actions. Instead, the most closely analogous state statute of limitations applies. Pp. 414–422.

(a) To determine the applicable statute of limitations for a cause of action created by federal statute, this Court asks first whether the statute expressly supplies a limitations period. If not, the most closely analogous state limitations period applies. Pp. 414–415.

(b) Section 3730(h) is a subsection of § 3730, but § 3731(b)(1) is nonetheless ambiguous about whether a § 3730(h) retaliation action is "a civil action under section 3730" as that phrase is used in § 3731(b)(1). Another reasonable reading is that § 3731(b)(1)'s limitations period applies only to §§ 3730(a) and (b) actions. Section 3731(b)(1) starts the limita-

tions period running on "the date on which the violation of section 3729 is committed," that is, on the date the false claim was actually submitted. That language casts doubt on whether § 3731(b)(1) specifies a limitations period for retaliation actions. For even a well-pleaded retaliation complaint need not allege that the defendant submitted a false claim, leaving the limitations period without a starting point if § 3731(b)(1) is applicable. By contrast, the section naturally applies to well-pleaded §§ 3730(a) and (b) actions. Those actions require a plaintiff to plead that the defendant submitted a false claim and therefore necessarily specify when § 3731(b)(1)'s time limit begins. At a minimum this anomaly shows that § 3731(b)(1) is ambiguous about whether "action under section 3730" means all actions arising under that section. Pp. 415–417.

(c) Two considerations show that the better way to resolve this ambiguity is to read the 6-year period to govern only §§ 3730(a) and (b) actions. First, the very next subsection, § 3730(c), uses the similarly unqualified phrase "action brought under section 3730" to refer only to §§ 3730(a) and (b) actions. Second, reading § 3731(b)(1) to apply only to those actions is in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the plaintiff has a complete and present cause of action. Where, as here, there are two plausible constructions, this Court should adopt the construction that starts the time limit running when the cause of action (here retaliation) accrues. This approach resolves § 3731(b)(1)'s ambiguity in petitioners' favor. Reading § 3731(b)(1) to exclude retaliation actions will generally start the limitations period running when the cause of action accrues, for the likely analogous state statutes virtually all start when the retaliatory action occurs. However, under the reading favored by Wilson and the Government, the limitations period would begin at best on the date an actual or suspected FCA violation occurred, which would precede the retaliatory conduct. Pp. 417–422.

(d) The Court of Appeals should determine in the first instance the appropriate state statute of limitations to borrow. P. 422.

367 F. 3d 245, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and in which SOUTER, J., joined as to all but n. 2. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 422. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 423.

Christopher G. Browning, Jr., Solicitor General of North Carolina, argued the cause for petitioners. With him on the

briefs were *Roy Cooper*, Attorney General, *Grayson G. Kelley*, Chief Deputy Attorney General, and *Jill B. Hickey*, Special Deputy Attorney General.

Mark T. Hurt argued the cause for respondent. With him on the brief was *Brian S. McCoy*.

Douglas Hallward-Driemeier argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, and *Douglas N. Letter*.*

JUSTICE THOMAS delivered the opinion of the Court.†

This case presents the question whether the 6-year statute of limitations in the False Claims Act (FCA or Act), see 31 U. S. C. § 3731(b)(1), governs FCA civil actions for retaliation, see § 3730(h). We hold that it does not and therefore conclude that the most closely analogous state limitations period applies.

I

The FCA prohibits any person from making false or fraudulent claims for payment to the United States. § 3729(a). Persons who do so are liable for civil penalties of up to $10,000 per claim and treble damages. *Ibid.* The Act sets forth two principal enforcement mechanisms for policing this proscription. First, the Attorney General may sue to rem-

---

*Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Robert J. Costagliola*; for the International Municipal Lawyers Association et al. by *John Charles Thomas* and *M. Christine Klein*; and for the National Defense Industrial Association et al. by *Mark R. Troy*, *C. Stanley Dees*, and *Lawrence S. Ebner*.

Ann Lugbill, *Mark Kleiman*, and *Robin Potter* filed a brief for the National Employment Lawyers Association et al. as *amici curiae* urging affirmance.

Gregory Stuart Smith and *Teresa Wynn Roseborough* filed a brief for the National Workrights Institute as *amicus curiae*.

†JUSTICE SOUTER joins all but footnote 2 of this opinion.

edy violations of § 3729. § 3730(a). Second, private individuals may bring *qui tam* actions in the Government's name for § 3729 violations. § 3730(b)(1); see *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 769–772 (2000). The *qui tam* relator must give the Government notice of the action, and the Government is entitled to intervene in the suit. § 3730(b)(2). The relator receives up to 30 percent of the proceeds of the action, in addition to attorney's fees and costs. §§ 3730(d)(1), (2).

The 1986 amendments to the FCA created a third enforcement mechanism: a private cause of action for an individual retaliated against by his employer for assisting an FCA investigation or proceeding. § 3730(h). Section 3730(h) provides in relevant part that

> "[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole."

Remedies for retaliation include reinstatement, two times the amount of backpay plus interest, special damages, litigation costs, and attorney's fees. *Ibid.*

The 1986 amendments also revised the language of the 6-year statute of limitations applicable to FCA actions. The previous version of the statute provided that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." § 3731(b) (1982 ed.). The 1986 amendments revised this provision to read:

"(b) A civil action under section 3730 may not be brought—

"(1) more than 6 years after the date on which the violation of section 3729 is committed, or

"(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed . . . ." § 3731 (2000 ed.).

In January 2001, relator Karen T. Wilson brought an FCA *qui tam* and retaliation action against petitioners. Petitioners Graham County Soil and Water Conservation District and Cherokee County Soil and Water Conservation District are special-purpose local government entities; the other petitioners are various local and federal officials. Graham County District employed Wilson as a secretary. Wilson alleged that petitioners made numerous false claims for payment to the United States in connection with a federal disaster relief program, the Emergency Watershed Protection Program, App. 17–20, and in connection with agricultural programs administered by North Carolina but funded by the Federal Government, *id.*, at 17–24.

Wilson contended, in addition, that Graham County District officials retaliated against her for aiding federal officials in their investigation of these false claims. *Id.*, at 25–30. Wilson alerted federal officials to petitioners' suspected fraudulent activities in December 1995 and cooperated with the ensuing investigation. *Id.*, at 26–27. Because of her cooperation, the complaint alleged, Graham County District officials repeatedly harassed her from 1996 to 1997, eventually inducing her to resign in March 1997. *Id.*, at 28–30.

Petitioners successfully moved to dismiss Wilson's retaliation action as untimely. They argued that the 6-year limitations period provided in § 3731(b)(1) did not apply to Wilson's

retaliation action. Absent an applicable federal limitations period, they asked the District Court to borrow North Carolina's 3-year statute of limitations for retaliatory-discharge actions. The District Court agreed and dismissed the retaliation claim, since Wilson filed it more than three years after her March 1997 discharge. App. to Pet. for Cert. 67a–70a. The court certified that ruling for interlocutory appeal. 224 F. Supp. 2d 1042, 1050–1051 (WDNC 2002).

On interlocutory appeal, a divided panel of the Court of Appeals for the Fourth Circuit reversed. In the majority's view, the plain language of § 3731(b)(1) supplies a limitations period for retaliation actions, making it unnecessary to borrow one from North Carolina law. The court reasoned that § 3731(b)(1) governs § 3730(h) retaliation actions, because it applies its 6-year limitations period to "'[a] civil action under section 3730.'" 367 F. 3d 245, 251 (2004) (brackets in original).

We granted certiorari to resolve a disagreement among the Courts of Appeals regarding whether § 3731(b)(1)'s 6-year statute of limitations applies to § 3730(h) retaliation actions or whether, instead, the most closely analogous state limitations period governs. 543 U. S. 1042 (2005). Compare *Neal* v. *Honeywell Inc.*, 33 F. 3d 860, 865–866 (CA7 1994) (holding that FCA 6-year period applies), with *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 162 F. 3d 1027, 1034–1035 (CA9 1998) (holding that most closely analogous state limitations period governs).

II

To determine the applicable statute of limitations for a cause of action created by a federal statute, we first ask whether the statute expressly supplies a limitations period. If it does not, we generally "borrow" the most closely analogous state limitations period. See *North Star Steel Co.* v. *Thomas*, 515 U. S. 29, 33–34 (1995); *Reed* v. *Transportation Union*, 488 U. S. 319, 324 (1989); *Agency Holding Corp.* v.

Malley-Duff & Associates, Inc., 483 U. S. 143, 157–165 (1987) (SCALIA, J., concurring in judgment) (tracing history of borrowing state limitations periods). In the rare case, we have even borrowed analogous federal limitations periods in the absence of an expressly applicable one, see, *e. g.*, *id.*, at 150–157, but no party points to a reason why we should do so here, and we can think of none. The only arguably applicable express statute of limitations is the 6-year limit set forth in § 3731(b)(1). The question, then, is whether § 3731(b)(1) applies by its terms to retaliation actions under § 3730(h); if it does not, our cases dictate that the most closely analogous state limitations period applies.

Under § 3731(b)(1), "[a] civil action under section 3730 may not be brought . . . more than 6 years after the date on which the violation of section 3729 is committed." Following the Court of Appeals' lead and supported by the United States appearing as *amicus curiae*, Wilson argues that this language unambiguously applies to FCA retaliation actions. She points out that § 3731(b)(1) applies a 6-year limitations period to "a civil action under section 3730," and that § 3730(h) actions arise under § 3730; hence, she claims, the 6-year period governs § 3730(h) actions. See *Neal*, *supra*, at 865–866 (arguing same). We think the statute is more complex than this argument supposes. Statutory language has meaning only in context, see, *e. g.*, *Leocal* v. *Ashcroft*, 543 U. S. 1, 9 (2004), and § 3731(b)(1), read in its proper context, does not govern § 3730(h) actions for retaliation.

Section 3731(b)(1) is ambiguous, rather than clear, about whether a § 3730(h) retaliation action is "a civil action under section 3730." Another reasonable reading is that it applies only to actions arising under §§ 3730(a) and (b), not to § 3730(h) retaliation actions. That reading is suggested by the language in § 3731(b)(1) tying the start of the time limit to "the date on which the violation of section 3729 is committed." In other words, the time limit begins to run on the date the defendant submitted a false claim for payment.

See *supra*, at 412–413. This language casts doubt on whether § 3731(b)(1) specifies a limitations period for retaliation actions. For even a well-pleaded retaliation complaint need not allege that the defendant submitted a false claim, leaving the limitations period without a starting point if § 3731(b)(1) is applicable. A retaliation plaintiff, instead, need prove only that the defendant retaliated against him for engaging in "lawful acts done . . . in furtherance of" an FCA "action filed or to be filed," § 3730(h), language that protects an employee's conduct even if the target of an investigation or action to be filed was innocent.[1] Applying § 3731(b)(1) to FCA retaliation actions, then, sits uneasily with § 3731(b)(1)'s language, which assumes that well-pleaded "action[s] under section 3730" to which it is applicable include a "violation of section 3729" certain from which to start the time running. Section 3731(b)(1), by contrast, naturally applies to well-pleaded §§ 3730(a) and (b) actions. They require the plaintiff to plead that the defendant submitted a false claim for payment, and therefore necessarily specify when § 3731(b)(1)'s time limit begins. This textual anomaly, at a minimum, shows that § 3731(b)(1) is ambiguous about whether "action under section 3730" means all actions under § 3730, or only §§ 3730(a) and (b) actions.

[1] See *United States ex rel. Karvelas* v. *Melrose-Wakefield Hospital*, 360 F. 3d 220, 236 (CA1 2004) (holding that protected conduct is "conduct that reasonably could lead to a viable FCA action"); *United States ex rel. Yesudian* v. *Howard Univ.*, 153 F. 3d 731, 740 (CADC 1998) (same); *Childree* v. *UAP/GA AG CHEM, Inc.*, 92 F. 3d 1140, 1146 (CA11 1996) (holding that disclosure to employer of possible FCA violation protected conduct where litigation is a "distinct possibility" at the time of the disclosure); *Fanslow* v. *Chicago Mfg. Center, Inc.*, 384 F. 3d 469, 480 (CA7 2004) (protected conduct is where employee had reasonable, good-faith belief that the employer is committing fraud against the United States); *Wilkins* v. *St. Louis Housing Auth.*, 314 F. 3d 927, 933 (CA8 2002) (same); *Moore* v. *California Inst. of Tech. Jet Propulsion Lab.*, 275 F. 3d 838, 845–846 (CA9 2002) (same). We endorse none of these formulations; we note only that all of them have properly recognized that proving a violation of § 3729 is not an element of a § 3730(h) cause of action.

Wilson and the United States dispute that the statute contains this anomaly, and instead urge that it clearly applies by its terms to all § 3730 actions. They point out that every § 3730(h) action requires the plaintiff to prove that he engaged in protected conduct related to at least a *suspected* violation of § 3729, and argue that § 3731(b)(1)'s limitations period simply begins to run on the date of the suspected violation. Assuming, without deciding, that § 3730(h) retaliation actions have as an element a suspected violation of § 3729, their interpretation indeed removes the anomaly, but only at the cost of reading into the statute the word "suspected" before the phrase "violation of section 3729." Section 3731(b)(1) speaks of "violation[s] of section 3729"—*actual*, not *suspected*, ones. Wilson and the United States answer that this argument proves too much, because even §§ 3730(a) and (b) actions involve only "suspected" violations of § 3729 at the pleading stage of litigation; but this response misses the point. Every § 3730(a) or (b) plaintiff who states or proves a valid claim for relief must allege or prove an actual violation of § 3729; retaliation plaintiffs need only allege or prove a suspected violation of § 3729 (or so we are willing to assume). The point is that § 3731(b)(1)'s language applies naturally to all successfully pleaded or proved retaliation actions only if one reads "suspected" into its terms, as the dissent essentially concedes. See *post*, at 425–426 (opinion of BREYER, J.).

Section 3731(b)(1)'s literal text, then, is ambiguous. Wilson and the Government ask us to read it as if it said "the [suspected or actual] violation of section 3729." Petitioners ask us to read § 3731(b) as if it said "civil action under section 3730[(a) or (b)]."

Two considerations convince us that the better way to resolve this ambiguity is to read the 6-year period to govern only §§ 3730(a) and (b) actions, and not § 3730(h) retaliation actions. First, the very next subsection of the statute, § 3731(c), also uses the similarly unqualified phrase "action

brought under section 3730" to refer only to §§ 3730(a) and (b) actions. Section 3731(c) provides that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." As Wilson and the United States concede, the context of this provision implies that the phrase "any action brought under section 3730" is limited to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party, as those are the types of § 3730 actions in which the United States necessarily participates. Otherwise, the United States would be "required to prove all essential elements of the cause of action," § 3731(c), in all § 3730 actions, regardless of whether it participated in the action (a consequence the dissent implicitly embraces by claiming that "any action brought under section 3730" in § 3731(c) means all § 3730 actions, see *post*, at 423–424 (opinion of BREYER, J.)). This implicit limitation of the phrase "action under section 3730" shows that Congress used the term "action under section 3730" imprecisely in § 3731 and, in particular, that Congress sometimes used the term to refer only to a subset of § 3730 actions. It is reasonable to read the same language in § 3731(b)(1) to be likewise limited.

Second, reading § 3731(b)(1) to apply only to §§ 3730(a) and (b) actions is in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues. We have repeatedly recognized that Congress legislates against the "standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997) (internal quotation marks omitted); see also *Johnson* v. *United States*, 544 U. S. 295, 305 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire before the claim arose); *Reiter* v. *Cooper*, 507 U. S. 258, 267 (1993) (declining to coun-

tenance the "odd result" that a federal cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute"); *TRW Inc.* v. *Andrews*, 534 U. S. 19, 37 (2001) (SCALIA, J., concurring in judgment) ("Absent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief" (internal quotation marks omitted)). Therefore, where, as the case is here, there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action (here retaliation) accrues.[2]

This approach resolves the ambiguity in § 3731(b)(1) in petitioners' favor. On the one hand, reading § 3731(b)(1) to exclude retaliation actions will generally start the limitations period running when the cause of action accrues. If § 3731(b)(1) excludes retaliation actions, then no express time limit applies to § 3730(h) actions, and we borrow the most closely analogous state time limit absent an expressly applicable one. See *supra*, at 414–415. The likely analogous state statutes of limitations virtually all start to run when the cause of action accrues—in retaliation actions, when the retaliatory action occurs.[3]

---

[2] JUSTICE STEVENS, we believe, misapplies this interpretive rule. *Post*, p. 422 (opinion concurring in judgment). He argues that § 3731(b)(1) does not govern § 3730(h) actions because "it is so unlikely that a legislature would actually intend" to start the statute of limitations running before the cause of action accrues that he "would presume that the anomaly was the product of a drafting error" regardless of whether the text is ambiguous. *Dodd* v. *United States*, *ante*, at 362, n. 1 (STEVENS, J., dissenting). This is not the proper analysis. Section 3731(b)(1) is ambiguous because its text, literally read, admits of two plausible interpretations. *Supra*, at 415–417. We apply the rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues to resolve that ambiguity, not to create it in the first instance.

[3] Ala. Code § 6–2–38 (West 1993) (catchall for tort actions not otherwise enumerated); § 36–26A–4(a) (West 2001) (retaliation action for whistleblowers); Alaska Stat. § 09.10.070 (Lexis 2004) (catchall); Ariz. Rev. Stat. Ann. § 12–541 (West 2003) (wrongful termination); Ark. Code Ann. § 16–

The interpretation favored by Wilson and the Government, on the other hand, is in tension with this rule of construction. Under their reading, the statute of limitations

---

56–115 (Lexis 1987) (catchall); § 21–1–604 (Lexis 2004) (retaliation action for whistle-blowers); Cal. Civ. Proc. Code Ann. § 335.1 (West Supp. 2005) (personal injuries); § 343 (West 1982) (catchall); Colo. Rev. Stat. § 13–80–102(1)(g) (Lexis 2004) (catchall); Conn. Gen. Stat. §§ 52–577, 31–51m (2005) (catchall for tort actions; retaliation action for whistle-blowers); Del. Code Ann., Tit. 10, § 8119 (Lexis 1999) (personal injuries); Tit. 29, § 5115 (Lexis 2003) (retaliation action for whistle-blowers); D. C. Code § 12–301(8) (West Supp. 2005) (catchall); Fla. Stat. §§ 112.3187(8)(a), 448.103 (2003) (whistle-blower actions); Ga. Code Ann. § 9–3–33 (Lexis 1982) (personal injuries); Haw. Rev. Stat. § 378–63(a) (Supp. 2004) (retaliation action for whistle-blowers); Idaho Code §§ 5–224, 6–2105(2) (Lexis 1998) (catchall; retaliation action for whistle-blowers); Ill. Comp. Stat. Ann., ch. 735, § 5/13–202 (West 2003) (personal injuries); Ind. Code § 34–11–2–4 (2004) (personal injuries); Iowa Code § 614.1 (2003) (personal injuries); Kan. Stat. Ann. §§ 60–513, 75–2973(h) (Supp. 2003) (catchall; retaliation action for whistle-blowers); Ky. Rev. Stat. Ann. § 413.120(7) (Lexis Supp. 2004) (catchall); § 61.103(2) (Lexis 2004) (retaliation action for whistle-blowers); La. Civ. Code Ann., Art. 3492 (West 1994) ("[d]elictual actions"; starts running on day injury or damage sustained, which is when the cause of action generally accrues for retaliatory actions); Me. Rev. Stat. Ann., Tit. 14, § 752 (West 1980) (catchall); Md. Cts. & Jud. Proc. Code Ann. § 5–101 (Lexis 2002) (catchall for civil actions at law); Mass. Gen. Laws, ch. 260, § 2A, ch. 149, § 185(d) (West 2004) (catchall for tort actions for personal injuries; retaliation action for whistle-blowers); Mich. Comp. Laws Ann. § 15.363(1) (West 2004) (retaliation action for whistle-blowers); Minn. Stat. § 541.07 (2004) (personal injuries); Miss. Code Ann. § 15–1–49 (Lexis 2003) (catchall); Mo. Rev. Stat. § 516.120 (2000) (catchall); Mont. Code Ann. § 39–2–911(1) (2003) (wrongful discharge); Neb. Rev. Stat. §§ 25–207, 25–212 (1995) (catchall); Nev. Rev. Stat. § 11.190.4(e) (2003) (personal injuries); N. H. Rev. Stat. Ann. § 508:4 (West 1997) (personal actions other than slander or libel); N. J. Stat. Ann. §§ 2A:14–1, 34:19–5 (West 2000) (catchall; retaliation action for whistle-blowers); § 2A:14–2(a) (West Supp. 2005) (personal injuries); N. M. Stat. Ann. § 37–1–4 (1990) (catchall); N. Y. Civ. Prac. Law Ann. § 215.4 (West 2003) ("action to enforce" a statute "given wholly or partly to any person who will prosecute"); N. Y. Lab. Law Ann. § 740.4(a) (West 2002) (retaliation action for whistle-blowers); N. C. Gen. Stat. §§ 1–52, 126–86 (Lexis 2003) (catchall; retaliation action for whistle-blowers); N. D. Cent. Code § 28–01–16 (Lexis 1991) (catchall); § 34–01–20.3 (Lexis 2004) (retalia-

for FCA retaliation actions begins to run, at best, on the date the actual or suspected FCA violation occurred. Because that date will precede the retaliatory conduct, their reading starts the time limit running before the retaliation action accrues. Even more oddly, their reading allows a retaliation action to be time barred before it ever accrues—for example, if the employer discovers more than six years after the suspected violation of § 3729 that an employee aided in investigating that fraud, then retaliates. As we have discussed, § 3731(b)(1)'s text permits a construction that avoids these counterintuitive results—that "civil action under section 3730" means only those civil actions under § 3730 that

---

tion actions for whistle-blowers); Ohio Rev. Code Ann. § 2305.09 (Lexis Supp. 2003) (catchall for torts); § 4113.52(D) (Lexis 2001) (retaliation action for whistle-blowers); Okla. Stat. Ann., Tit. 12, § 95 (West Supp. 2005) (catchall); Ore. Rev. Stat. § 12.110(1) (2003) (catchall); 42 Pa. Cons. Stat. § 5524(7) (2002) (catchall); Pa. Stat. Ann., Tit. 43, § 1424(a) (Purdon 1991) (retaliation action for whistle-blowers); R. I. Gen. Laws § 9–1–14(a) (Lexis 1997) (injuries to the person); § 28–50–4 (Lexis 2003) (retaliation action for whistle-blowers); S. C. Code Ann. § 15–3–530 (West 2005) (catchall); § 8–27–30(B) (West Supp. 2004) (retaliation action for whistle-blowers); S. D. Codified Laws § 15–2–14(3) (West 2004) (action for personal injury); Tenn. Code Ann. § 28–3–104(a)(1) (Lexis 2000) (personal injuries); Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West 2002) (personal injuries); Tex. Govt. Code Ann. § 554.005 (West 2004) (retaliation action for whistle-blowers); Utah Code Ann. §§ 78–12–29(1), (2) (Lexis 2002) (liability created by statute of foreign state; liability created by statute); § 67–21–4(2) (Lexis 2004) (retaliation action for whistle-blowers); Vt. Stat. Ann., Tit. 12, § 511 (Lexis 2002) (catchall); Va. Code Ann. §§ 8.01–243(A), 8.01–248 (Lexis 2000) (personal injuries; catchall); Wash. Rev. Code § 4.16.080(2) (2004) (catchall for injuries to person); W. Va. Code § 55–2–12 (Lexis 2000) (catchall); § 6C–1–4(a) (Lexis 2003) (retaliation action for whistle-blowers); Wis. Stat. § 893.57 (2003–2004) (intentional torts); Wyo. Stat. §§ 1–3–105(a)(iv)(C), 9–11–103(c) (2003) (catchall; retaliation action for whistle-blowers). But see Vt. Stat. Ann., Tit. 12, § 512 (Lexis 2002) (personal injury statute of limitations starts on the date of the discovery of the injury); D. C. Code § 1–615.54 (West 2001) (whistle-blower action may be brought within one year of the time the employee learns of the retaliation). We stress that these are only the likely candidates for analogous state statutes of limitations; it may well not be an exhaustive or authoritative list of the possibilities.

have as an element a "violation of section 3729," that is, §§ 3730(a) and (b) actions.

Granted, other textual evidence cuts against this reading of § 3731(b)(1). In particular, Congress used the phrase "brought under subsection (a) or (b) of section 3730" in § 3731(d); this, it is argued, shows that Congress could have been similarly precise in § 3731(b)(1) if it wished. In the context of this statute, however, that argument proves too much, since the same could be said of § 3731(c), which all agree uses the phrase "action under section 3730" in more limited, and less precise, fashion. See *supra*, at 417–418. We do not doubt that Congress could have drafted § 3731(b)(1) with more precision than it did, but the presence of the same inexact wording in § 3731(c) means that the more precise language in § 3731(d) casts little doubt on our reading of the statute.

* * *

For the reasons we have discussed, the FCA's express limitations period does not apply to § 3730(h) actions. The most closely analogous state statute of limitations therefore applies. Judge Wilkinson, in his dissenting opinion below, concluded that the most closely analogous state statute of limitations in this case is North Carolina's 3-year statute of limitations governing wrongful-discharge claims. See 367 F. 3d, at 261–262. The appropriate state statute of limitations to borrow, however, is not within the scope of the question we granted certiorari to decide, and the Court of Appeals did not pass on the point. We therefore leave that issue for remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Dodd* v. *United States*, *ante*, p. 360, I concur in the judgment.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

As the Court points out, it is unusual to find a statute of limitations keyed not to the time of the plaintiff's injury, but to other related events. Still, I believe that Congress has written such a statute here, and we should respect its decision.

The language of the statute, 31 U. S. C. § 3731(b)(1), is reasonably clear. It says that "[a] civil action *under section 3730* may not be brought . . . more than 6 years after the date on which the violation" of federal false claims law "is committed." (Emphasis added.) Section 3730 lists three kinds of civil actions, including a retaliation action under § 3730(h). Thus, a retaliation action is a "civil action under section 3730," and § 3731(b)(1)'s 6-year limitations period applies.

The Court tries to overcome the force of this syllogism with the help of two textual arguments. First, it points to the subsection that follows § 3731(b)—§ 3731(c)—which says that "'[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.'" See *ante*, at 418. The Court then reasons that, read in context, the phrase "action brought under section 3730" could not refer to *all* the civil actions listed under § 3730, for the United States is not ordinarily a party to private retaliation suits brought under § 3730(h). *Ibid.* Rather, the phrase "action brought under section 3730" must refer only to the false claims actions listed in §§ 3730(a) and (b). *Ibid.* Thus, according to the Court, if in § 3731(c), the phrase "action brought under section 3730" refers only to a *subset* of the actions listed under § 3730, one can read the similar phrase in § 3731(b)(1) to contain a similar limitation. *Ibid.*

The problem with this argument lies in its conclusion. The reason that § 3731(c) may apply only to §§ 3730(a) and

(b) actions has nothing to do with the phrase "action brought under section 3730." Rather, any limitation on §3731(c)'s application comes from different words, namely, "the United States." These latter words make clear not that the phrase "under section 3730" has a different *meaning* than in (b), but that (c) comes into play only in cases in which the United States is a party (and *only* in such cases, cf. *ibid.*). Because it is these words—the subject of the subsection, "the United States"—that determines whether (c) has application in any given case, there is nothing in §3731(c) that would make it "reasonable," *ibid.*, to read the phrase "action under section 3730" *in §3731(b)(1)* to apply, as the Court concludes, to only "two out of three actions under section 3730."

The subsections surrounding §§3731(b) and (c) further undermine the Court's extratextual limitation on "[a] civil action under section 3730." In §3731(a), Congress apparently used the phrase "under section 3730" to mean all three §3730 actions. §3731(a) (a "subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States"). And in §3731(d), Congress used the very words that the Court seeks to find in §3731(b), but that do not there exist—namely, the words "under subsection (a) or (b) of section 3730"—when it meant to narrow a provision's compass to two out of the three §3730 causes of action. §3731(d) ("[A] final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements . . . shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730"); see also *ante*, at 421–422. The statutory context therefore shows that Congress did not intend for the phrase "[a] civil action under section 3730" to mean anything other than what it says.

Second, the Court points to language in § 3731(b)(1) that specifies *when* the limitations period begins to run: "the date on which the violation" of the false claims provision, § 3729, "is committed." See *ante*, at 415–416. It then points out that a retaliation action does not necessarily involve an *actual* false claims violation, because (it assumes) a retaliation plaintiff need only show "a *suspected* violation." *Ante*, at 417 (emphasis in original). Thus, adopting relator's and the Government's reading, the Court reasons, would require reading some words into § 3731(b)(1)—so that it would say "'the [suspected or actual] violation'"—which would distort the statute more than reading some other, different words into the statute—so that it would say "'[a] civil action under section 3730[(a) or (b)].'" *Ibid.*

The difficulty with the Court's choice of the latter linguistic addition is that the two sets of textual insertions—on the one hand "suspected or actual," on the other hand "(a) or (b)"—are not equivalent. Statutes of limitations, when referring to starting points, generally refer not to *actual* events, but to *alleged* events. Thus, a plaintiff's tort action is timely if he files it within, say, three years of the *alleged* negligently caused injury; a plaintiff's breach-of-contract action is timely if filed within, say, one year of the *alleged* breach. And a plaintiff who loses such an action because the defendant shows, say, that there was no such injury or no such breach, has not, for that reason, brought the action outside the limitations period. Rather, the suit is still timely even though the violation remains nothing more than "alleged" after trial. Such a plaintiff has simply lost a timely filed action on the merits.

The provision before us is no different. Section 3731(b)(1)'s 6-year time clock begins to run on "the date on which the violation" of federal false claims law, § 3729, "is committed." Thus, any § 3730 plaintiff—even one bringing a false claims action under § 3730(a) or § 3730(b)—has six

years from the moment of a suspected—that is, an unproven—violation of the False Claims Act's antifraud provision. Thus, as naturally interpreted, the words "the date on which the violation . . . is committed" refer to the date on which the suspected violation occurs.

I recognize that there is a relevant distinction in this case. In the typical case (say, the tort or contract case) the plaintiff must ultimately prove all the relevant allegations. Here, the retaliation victim need not prove that her employer did in fact violate federal false claims law, but only that she believed that there was such a violation. See *ibid.* But that distinction does not make the difference. Given the clear link between claimed violations of federal false claims law and retaliation actions (the latter depend on the former) and given that triggering events in statutes of limitations implicitly mean *alleged* triggering events, §3731(b)(1) remains most naturally read as implicitly referring to alleged or suspected violations of federal false claims law. And at the very least, reading the statute in this way, especially in light of the other statutory indicators, see *supra*, at 423–424, does far less violence to §3731(b)(1)'s text than does the Court's addition of "(a) or (b)."

The Court's far stronger argument is not textual. It concerns the limitations provision's purpose. That purpose, after all, includes providing victims of retaliation a reasonable time within which they can file an action to vindicate their rights. Cf. S. Rep. No. 99–345, p. 34 (1986) (addition of a retaliation cause of action intended "to halt companies . . . from using the threat of economic retaliation to silence 'whistleblowers'" and to "assure those who may be considering exposing fraud that they are legally protected from retaliatory acts"). How can we reconcile that purpose with a reading of the statute that, as a matter of logic, could allow the limitations period to begin to run, perhaps even to terminate, before the forbidden retaliation occurs? See *ante*, at 421.

The answer, in my view, is that Congress could have had a particular *qui tam*-related purpose in mind. That is, it could have intended to provide a fairly lengthy limitations period, namely, six years from the time the false claims conduct occurs, applicable to *all* related actions, and then to put an end to all such litigation. This makes particular sense given the reasonable assumption that false claims and retaliation actions are likely to be litigated together. See, *e. g.*, App. 11–35 (relator's complaint pursuing both *qui tam* and retaliation claims in same suit); *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 162 F. 3d 1027, 1030 (CA9 1998) (same).

Of course, as the Court emphasizes, such an unusual provision exacts a price, namely, possible injury to an individual who suffers retaliation that comes late in the day. But apparently there is no such individual. Neither the Court nor petitioners have been able to find any actual example. See, *e. g.*, Tr. of Oral Arg. 5, 6; see also Brief for United States as *Amicus Curiae* 27–28 (United States is unaware of any such example). Nor have I.

By contrast, the Court's reading of the statute exacts a different, but certain, price. It substitutes for a fairly lengthy—and *uniform*—6-year limitations term, a crazy quilt of limitations periods stitched together from the laws of 51 jurisdictions which, in some instances, might require a plaintiff to bring a retaliation claim within 90 days, six months, or one year after the retaliation takes place. See, *e. g.*, Ky. Rev. Stat. Ann. §61.103(2) (Lexis 2004) (90-day limitations period for certain whistle-blower actions); Fla. Stat. §112.3187(8)(a) (2003) (180-day limitations period); *Hughes Aircraft Co.*, *supra*, at 1035 (California's 1-year limitations period for wrongful termination in violation of public policy applies to §3730(h) action). Rather than shed crocodile tears for the imagined plight of a nonexistent whistle-blower as petitioners ask us to do, I would read the statute to do what the statute says Congress wanted: to provide a rela-

tively long, single, uniform limitations period that, in practice, seems to protect the many real potential plaintiffs, such as relator, who will otherwise find themselves shut out of court. Such a reading also avoids the attendant practical difficulties and uncertainties inherent in requiring federal courts to borrow state statutes of limitations. See *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369, 377–380, and n. 13 (2004) (discussing problems with this practice).

For these reasons, I respectfully dissent.

Syllabus

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL.

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 03–1230. Argued April 26, 2005—Decided June 20, 2005

Petitioners, a trucking company engaged in both interstate and intrastate hauling and a trucking association, asked Michigan courts to invalidate the State's flat $100 annual fee imposed on trucks engaged in intrastate commercial hauling, see Mich. Comp. Laws Ann. § 478.2(1), claiming that it discriminates against interstate carriers and imposes an unconstitutional burden on interstate trade because trucks carrying both interstate and intrastate loads engage in less intrastate business than trucks carrying only intrastate loads. The State Court of Claims rejected the claim, holding that, because the fee is regulatory and intended for the Michigan Motor Carrier Act's administration, it is not amenable to apportionment; that it is an appropriate exercise of the State's police power; and that it does not implicate the Commerce Clause because it falls only on intrastate commerce. The State Court of Appeals affirmed, and the State Supreme Court declined review.

Held: Michigan's fee does not violate the dormant Commerce Clause. That Clause prevents a State from "jeopardizing the welfare of the Nation as a whole" by "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 180. Applying this Court's dormant Commerce Clause principles and precedents here, nothing in § 478.2(1) offends the Commerce Clause. The flat fee is imposed only on intrastate transactions. It does not facially discriminate against interstate or out-of-state activities or enterprises. It applies evenhandedly to all carriers making domestic journeys and does not reflect an effort to tax activity taking place outside of the State. Nothing in this Court's case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause. That is not surprising, since States impose numerous flat fees on local business and service providers, *e. g.*, insurers and auctioneers. The Constitution neither displaces States' authority to shelter their people from health and safety menaces nor unduly curtails their power to lay taxes to support state government. The record, moreover, shows no special circumstances suggesting that Michigan's fee operates as anything other than an unobjectionable exercise of the State's police power.

Syllabus

Neither does it show that the flat assessment unfairly discriminates against interstate truckers. Because the costs the fee seeks to defray, *e. g.*, those of regulating vehicular size and weight, would seem more likely to vary per truck or per carrier than per mile traveled, a per-truck, rather than a per-mile, assessment is likely fair. And petitioners provide no details of their preferred alternative miles-traveled system or point to evidence of its practicality. Nor is there any reason to infer that the State's lump-sum levy on purely local activity erects an impermissible discriminatory roadblock. *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, distinguished. As for petitioners' "internal consistency" argument—that if every State did the same as Michigan, an interstate trucker doing local business in multiple States would have to pay a fee of several hundred or thousand dollars—any interstate firm with local outlets normally expects to pay local fees uniformly assessed on all those engaging in local business. Pp. 433–438.

255 Mich. App. 589, 662 N. W. 2d 784, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., *post*, p. 439, and THOMAS, J., *post*, p. 439, filed opinions concurring in the judgment.

Robert Digges, Jr., argued the cause for petitioners. With him on the briefs were *Charles Rothfeld* and *Evan Tager*.

Henry J. Boynton, Assistant Solicitor General of Michigan, argued the cause for respondents. With him on the brief were *Michael A. Cox*, Attorney General, *Thomas L. Casey*, Solicitor General, and *David A. Voges*, *Michael A. Nickerson*, *Glenn R. White*, and *Emmanuel B. Odunlami*, Assistant Attorneys General.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Sushma Soni*, *Jeffrey A. Rosen*, *Paul M. Geier*, and *Dale C. Andrews*.*

---

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Christopher J. Wright* and *Robin S. Conrad*; for Deeco Services, Inc., dba Deeco Transportation, et al.

JUSTICE BREYER delivered the opinion of the Court.

In this case, we consider whether a flat $100 fee that Michigan charges trucks engaging in intrastate commercial hauling violates the dormant Commerce Clause. We hold that it does not.

I

A subsection of Michigan's Motor Carrier Act imposes upon each motor carrier "for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier." Mich. Comp. Laws Ann. § 478.2(1) (West 2002). The provision assesses the fee upon, and only upon, vehicles that engage in intrastate commercial operations—that is, on trucks that undertake point-to-point hauls between Michigan cities. See *Westlake Transp., Inc.* v. *Michigan Pub. Serv. Comm'n*, 255 Mich. App. 589, 592–594, 662 N. W. 2d 784, 789 (2003). Petitioners, USF Holland, Inc., a trucking company with trucks that engage in both interstate and intrastate hauling, and the American Trucking Associations, Inc. (ATA), asked the Michigan courts to invalidate the provision. Both petition-

---

by *Robert E. McFarland;* and for the Eagle Forum Education & Legal Defense Fund by *Douglas G. Smith.*

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan,* Attorney General of Illinois, *Gary Feinerman,* Solicitor General, *Nadine J. Wichern,* Assistant Attorney General, and *Dan Schweitzer,* and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Thomas J. Miller* of Iowa, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, and *Darrell V. McGraw, Jr.,* of West Virginia; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley.*

ers told those courts that trucks that carry *both* interstate *and* intrastate loads engage in intrastate business less than trucks that confine their operations to the Great Lakes State. Hence, because Michigan's fee is flat, it discriminates against interstate carriers and imposes an unconstitutional burden upon interstate trade.

The Michigan Court of Claims rejected the carriers' claim for three reasons. First, the $100 fee "is regulatory and intended" for the Motor Carrier Act's administration, which includes "regulation of vehicular size and weight, insurance requirements and safety standards." App. to Pet. for Cert. 44a. Such a fee "is not amenable to a fee structure based on apportionment by usage rates." *Ibid.* Second, the fee reflects a "legitimate expression of the [S]tate's concern that the welfare of its citizens be protected," and hence an appropriate exercise of the State's police power. *Ibid.* Third, the fee does not implicate the Commerce Clause because it falls only on intrastate, not interstate, commerce. *Id.*, at 45a.

The Michigan Court of Appeals affirmed. It did not agree that the intrastate nature of § 478.2(1) sheltered the fee from Commerce Clause scrutiny. 255 Mich. App., at 617–619, 662 N. W. 2d, at 802. Nonetheless, the court rejected the truckers' claim because the statute "regulates evenhandedly," *id.*, at 621, 662 N. W. 2d, at 804, and because the record lacked any "evidence that any trucking firm's route choices [were] affected by the imposition of the fee," *id.*, at 621, 662 N. W. 2d, at 803–804. Rather, the record indicated that any "effect . . . on interstate commerce is incidental," rendering the truckers' claim of discrimination "a matter of pure speculation." *Ibid.*

The Michigan Supreme Court denied petitioners leave to appeal. *Westlake Transp., Inc.* v. *Michigan Pub. Serv. Comm'n*, 469 Mich. 976, 673 N. W. 2d 752 (2003). We granted their petition for certiorari and consolidated the case with *Mid-Con Freight Systems, Inc.* v. *Michigan Pub. Serv. Comm'n*, *post*, p. 440, a case in which interstate truckers

sought review of a separate state motor carrier fee. We now affirm the Michigan court's judgment sustaining § 478.2(1).

II

Our Constitution "was framed upon the theory that the peoples of the several states must sink or swim together." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935). Thus, this Court has consistently held that the Constitution's express grant to Congress of the power to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, contains "a further, negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 179 (1995), that "create[s] an area of trade free from interference by the States," *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 328 (1977) (internal quotation marks omitted). This negative command prevents a State from "jeopardizing the welfare of the Nation as a whole" by "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Jefferson Lines*, *supra*, at 180.

Thus, we have found unconstitutional state regulations that unjustifiably discriminate on their face against out-of-state entities, see *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), or that impose burdens on interstate trade that are "clearly excessive in relation to the putative local benefits," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). We have held that States may not impose taxes that facially discriminate against interstate business and offer commercial advantage to local enterprises, see, *e. g.*, *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99–100 (1994), that improperly apportion state assessments on transactions with out-of-state components, *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948), or that have the "inevitable effect [of] threaten[ing] the free movement of commerce by placing a financial barrier around the State," *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 284 (1987).

Applying these principles and precedents, we find nothing in § 478.2(1) that offends the Commerce Clause. To begin with, Michigan imposes the flat $100 fee only upon intrastate transactions—that is, upon activities taking place exclusively within the State's borders. Section 478.2(1) does not facially discriminate against interstate or out-of-state activities or enterprises. The statute applies evenhandedly to all carriers that make domestic journeys. It does not reflect an effort to tax activity that takes place, in whole or in part, outside the State. Nothing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause.

This legal vacuum is not surprising. States impose numerous flat fees upon local businesses and service providers, including, for example, upon insurers, auctioneers, ambulance operators, and hosts of others. See, *e. g.*, Wyo. Stat. § 33–36–104 (Lexis 2003); S. C. Code Ann. § 38–7–10 (West 2002). Although we have "long since rejected any suggestion that a state tax . . . affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity," *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 615 (1981), we have also made clear that the Constitution neither displaces States' authority "to shelter [their] people from menaces to their health or safety," *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 29 (1988) (internal quotation marks omitted), nor "unduly curtail[s]" States' power "to lay taxes for the support of state government," *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 48 (1940).

The record, moreover, shows no special circumstance suggesting that Michigan's fee operates in practice as anything other than an unobjectionable exercise of the State's police power. To the contrary, as the Michigan Court of Appeals pointed out, the record contains little, if any, evidence that the $100 fee imposes any significant practical burden upon interstate trade. See 255 Mich. App., at 620–622, 662 N. W.

2d, at 803–804. The record does show, for example, that some interstate trucks "top off" some interstate hauls with intrastate pickups and deliveries. See Brief for Intervening Plaintiffs-Appellants in Nos. 226052, 226122 (Ct. App. Mich.), Exh. 3, Affidavit of James C. Crozier ¶ 7 (licensing and fuel manager of TNT Holland Motor Express, Inc., describing this practice). But it does not tell us the answers to such questions as: How often does "topping off" occur across the industry? Does the $100 charge make a difference by significantly discouraging interstate carriers from engaging in "topping off"? Does the possibility of obtaining a 72-hour intrastate permit for $10 alleviate the alleged problem? See § 478.2(3); see also Brief for Respondents 2, n. 3 (4,928 temporary permits were issued in 2004). If the fees ($100 and $10) discourage "topping off," does that *local* commercial effect make a significant *interstate* difference? Would a variable fee (of the kind the truckers advocate) eliminate such difference? The minimal facts in the record tell us little about these matters. Compare App. 60–61, Supplemental Affidavit of Thomas R. Lonergan ¶ 10(e) (official of the Michigan Public Service Commission stating that topping off is rare for most interstate carriers because it disrupts schedules and shipping patterns), with Reply Brief for Intervening Plaintiffs-Appellants in Nos. 226122, 226137 (Ct. App. Mich.), Exh. A, Supplemental Affidavit of James C. Crozier ¶ 6 (TNT Holland frequently tops off interstate loads). And at oral argument, ATA conceded the absence of record facts that empirically could show that the $100 fee significantly deters interstate trade. Tr. of Oral Arg. 5.

Neither does the record show that the flat assessment unfairly discriminates against interstate truckers. The fee seeks to defray costs such as those of regulating "vehicular size and weight," of administering "insurance requirements," and of applying "safety standards." App. to Pet. for Cert. 44a. The bulk of such costs would seem more likely to vary per truck or per carrier than to vary per mile traveled. See

255 Mich. App., at 612–617, 662 N. W. 2d, at 799–801. And that fact means that a per-truck, rather than a per-mile, assessment is likely fair. Cf. *Jefferson Lines*, 514 U. S., at 199 (rejecting taxpayer's discrimination claim in part because "miles traveled within the State simply are not a relevant proxy for the benefit conferred upon the parties to a sales transaction"). Nothing in the record suggests the contrary.

Nor would an effort to switch the manner of fee assessment—from lump sum to, for example, miles traveled—be burden free. The record contains an affidavit, sworn by a Michigan Public Service Commission official, that states that to obtain the same revenue (about $3.5 million) through a per-mile fee would require the State to create a "data accumulation system" capable of separating out intrastate hauls and determining their length, and to develop related liability, billing, and auditing mechanisms. App. 64, Second Supplemental Affidavit of Thomas R. Lonergan ¶ 2. This affidavit, on its face, suggests that the game is unlikely to be worth the candle. While petitioners argue the contrary, they do not provide the details of their preferred alternative administrative system nor point to record evidence showing its practicality. See *Jefferson Lines*, *supra*, at 195 (State is not required to use a particular apportionment formula just because it may be "possible" to do so).

Petitioners insist that they do not need empirically to demonstrate the existence of a burdensome or discriminatory impact upon interstate trucking, or (presumably) the unfairness of the assessment in relation to defrayed costs, or (presumably) the administrative practicality of the alternatives. They say that our earlier case, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987), requires invalidation of the $100 flat fee, even in the absence of such proof. We disagree.

In *Scheiner*, this Court invalidated a flat $25 "marker fee" and a flat "axle tax" that Pennsylvania levied upon all trucks (interstate and intrastate) that used its roads, including

trucks that merely crossed Pennsylvania's borders to transport, say, Ohio goods to New Jersey customers. See *id.*, at 273–275. Data showed that the fees imposed a cost per mile on interstate trucks that was approximately "five times as heavy as the cost per mile borne by local trucks." *Id.*, at 286. The assessments largely helped to raise revenue "to improve and maintain [the State's] highways and bridges," *id.*, at 270, thereby helping to cover costs likely to vary significantly with truck-miles traveled, see *ibid.* And the assessments did "not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." *Id.*, at 290. In light of these considerations, Pennsylvania's lump-sum taxes "threaten[ed] the free movement of commerce by placing a financial barrier around the State of Pennsylvania." *Id.*, at 284. We concluded that "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there [was] no conceivable doubt that commerce among the States would be deterred." *Ibid.*

The present fee, as we have said, taxes purely local activity; it does not tax an interstate truck's entry into the State nor does it tax transactions spanning multiple States. See 255 Mich. App., at 592–594, 662 N. W. 2d, at 789. We lack convincing evidence showing that the tax deters, or for that matter discriminates against, interstate activities. See *supra*, at 434–435. Nor is the tax one that, on its face, would seem to call for an assessment measured per mile rather than per truck. See *supra*, at 435–436. Consequently, we lack any reason to infer that Michigan's lump-sum levy erects, as in *Scheiner*, an impermissible discriminatory roadblock.

Petitioners add that Michigan's fee fails the "internal consistency" test—a test that we have typically used where taxation of interstate transactions is at issue. Generally speaking, that test asks, "What would happen if all States did the same?" See, *e. g.*, *Goldberg* v. *Sweet*, 488 U. S. 252, 261 (1989); *Jefferson Lines*, *supra*, at 185 (test looks to the

structure of the tax to see whether its identical application by every State "would place interstate commerce at a disadvantage as compared with commerce intrastate"). We must concede that here, as petitioners argue, if all States did the same, an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars, were it to "top off" its business by carrying local loads in many (or even all) other States. But it would have to do so only because it engages in *local* business in all those States. An interstate firm with local outlets normally expects to pay local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike. See, *e. g.*, *Commonwealth Edison*, 453 U. S., at 623–624 (dormant Commerce Clause does not seek "to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business" (internal quotation marks omitted)); cf. *Jefferson Lines*, *supra*, at 187–188 (in context of sales tax, "the Commerce Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along"). A motor carrier is not special in this respect.

In sum, petitioners have failed to show that Michigan's fee, which does not seek to tax a share of interstate transactions, which focuses upon local activity, and which is assessed evenhandedly, either burdens or discriminates against interstate commerce, or violates the Commerce Clause in any other relevant way. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977) (noting that a tax will be sustained where it is applied to an activity with a "substantial nexus" to the taxing State; where, if applied to interstate activity, it is "fairly apportioned"; where it does not discriminate; and where it is "fairly related to the services provided").

For these reasons, the judgment of the Michigan Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

Michigan imposes a flat fee on trucks that engage in purely intrastate commercial operations. I agree with the Court that this fee does not violate the negative Commerce Clause. Unlike the Court, *ante*, at 433, 437–438, I reach that determination without adverting to various tests from our wardrobe of ever-changing negative Commerce Clause fashions: the balancing approach from *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the four-factor test from *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), and the internal-consistency test from cases such as *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987). Instead, I ask whether the fee "facially discriminates against interstate commerce" and whether it is "indistinguishable from a type of law previously held unconstitutional by this Court." *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 210 (1994) (SCALIA, J., concurring in judgment). As the Court correctly concludes, Michigan's fee meets neither of those conditions. It does not facially discriminate against interstate commerce, *ante*, at 434, and it is distinguishable from petitioners' best analogue, the fees invalidated in *Scheiner*, which applied to interstate trucks even when they engaged in *no* intrastate business, *ante*, at 436–437.

JUSTICE THOMAS, concurring in the judgment.

I would affirm the judgment of the Michigan Court of Appeals because "'[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application,' *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 610 (1997) (THOMAS, J., dissenting), and, consequently, cannot serve as a basis for striking down a state statute." *Hillside Dairy Inc.* v. *Lyons*, 539 U. S. 59, 68 (2003) (THOMAS, J., concurring in part and dissenting in part).

Syllabus

MID-CON FREIGHT SYSTEMS, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL.

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 03–1234. Argued April 26, 2005—Decided June 20, 2005

Federal law requires most interstate truckers to obtain a permit (Federal Permit) that reflects compliance with certain federal requirements. The 1965 version of the law authorized States to require proof that a truck operator had such a permit. By 1991, 39 States demanded such proof, requiring a $10 per truck registration fee (State Registration) and giving each trucker a stamp to affix to a multistate "bingo card" carried in the vehicle. Finding this scheme inefficient and burdensome, Congress created the current Single State Registration System (SSRS), which allows a trucking company to fill out one set of forms in one State (base State), thereby registering its Federal Permit in every participating State through which its trucks travel. 49 U. S. C. § 14504(c). The base State can demand proof of the Federal Permit, proof of insurance, the name of an agent to receive service of process, and a fee equal to the sum of the individual state fees. §§ 14504(c)(2)(A)(i)–(iv). The SSRS prohibits a State from imposing any additional "State registration requirement." § 14504(b). Michigan Comp. Laws Ann. § 478.2(2) imposes an annual $100 fee on each Michigan license-plated truck operating entirely in interstate commerce. Petitioner interstate trucking companies subject to § 478.2(2) sought to have it invalidated, but the Michigan Court of Claims refused. The State Court of Appeals affirmed, holding that, because the fee is imposed for the administration of the State's Motor Carrier Act and for enforcement of state safety regulations, it is not a "registration requirement" pre-empted by § 14504(b).

Held: Section 14504 does not pre-empt Michigan's $100 fee. Pp. 446–453.

(a) Reference to text, historical context, and purpose disclose that the words "State registration requirement" in § 14504(b)'s second sentence apply only to those state requirements concerning SSRS registration. Statutory language makes clear that the federal provision reaches no further. The subsection's first sentence uses the words "State registration" to refer only to state systems seeking evidence that a trucker has complied with the specific SSRS obligations enumerated in §§ 14504(c)(2)(A)(i)–(iv). No language in the second sentence suggests that the same words should be given a different, broader meaning there. Nor does any language elsewhere in the statute suggest that "State

registration requirement" refers to *any* kind of State Registration whatsoever that might affect interstate carriers, or to those state requirements imposed by reason of a motor carrier's operation in interstate commerce. The implementing regulations also do not support a broader meaning. Historical context confirms this reading. Congress enacted § 14504 to simplify the "bingo card" system, which placed no constraints on any state filings or fees other than those concerning Federal Permit and insurance requirements. In creating the SSRS, Congress gave no indication that the pre-emptive scope of the new scheme would be any broader than that of the old. Finally, nothing in the statute's basic purposes or objectives—improving the "bingo card" system's efficiency and simplifying a uniform scheme for providing States with certain vital information—either requires a broader reading of the statutory term or impliedly pre-empts non-SSRS-related state rules. Pp. 446–451.

(b) Section 478.2(2)'s requirements do not concern the SSRS's subject matter. First, the Michigan statute makes no reference to evidence of a Federal Permit, an insurance requirement, or an agent for receiving service of process. Nor do any state rules related to the fee appear to require the filing of information on these matters. In addition, because Michigan imposed its separate fee before the SSRS existed and before it began to participate in the "bingo card" system, the fee does not represent an effort to circumvent the limitations imposed in connection with federal laws governing State Registration of Federal Permits. Finally, petitioners have failed to show that Michigan rules do not allow a Michigan-plated interstate truck choosing Michigan as its base State to comply with the SSRS requirements even if it does not comply with § 478.2(2). The fact that Michigan appears to forgive the State's $10 SSRS fee for trucks that comply with § 478.2(2) can be seen as an effort to provide a modest, administratively efficient recompense to those motor carriers that choose Michigan as their base State, but such a subsidiary connection cannot transform the State's fee into a requirement concerning the SSRS statute's subject matter. Pp. 451–453.

255 Mich. App. 589, 662 N. W. 2d 784, affirmed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 456.

James H. Hanson argued the cause for petitioners. With him on the brief were *Andrew K. Light* and *Lynne D. Lidke.*

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, Mark B. Stern, Sushma Soni, Jeffrey A. Rosen, Paul M. Geier,* and *Dale C. Andrews.*

Henry J. Boynton, Assistant Solicitor General of Michigan, argued the cause for respondents. With him on the brief were *Michael A. Cox,* Attorney General, *Thomas L. Casey,* Solicitor General, and *David A. Voges, Michael A. Nickerson, Glenn R. White,* and *Emmanuel B. Odunlami,* Assistant Attorneys General.

JUSTICE BREYER delivered the opinion of the Court.

This case concerns pre-emption. A Michigan law imposes "an annual fee of $100.00" upon each Michigan license-plated truck that is "operating entirely in interstate commerce." Mich. Comp. Laws Ann. § 478.2(2) (West 2002) (hereinafter MCL). A federal statute states that "a *State registration requirement* . . . is an unreasonable burden" upon interstate commerce when it imposes so high a fee. 49 U. S. C. § 14504(b) (emphasis added); see also § 14504(c)(2)(B)(iv)(III). Does this federal statutory provision pre-empt the Michigan law? We conclude that the Michigan fee requirement is not the kind of "State registration requirement" to which the federal statute refers. And for that reason, the statute does not pre-empt it.

I

A

Federal law has long required most motor carriers doing interstate business to obtain a permit—which we shall call a Federal Permit—that reflects compliance with certain federal requirements. See 49 U. S. C. § 13901 *et seq.*; 49 CFR § 365.101 *et seq.* (2004). In 1965, Congress authorized States to require proof that the operator of an interstate truck had secured a Federal Permit. 49 U. S. C. § 302(b)(2) (1976 ed.);

see generally *Yellow Transp., Inc.* v. *Michigan*, 537 U. S. 36, 39 (2002). By 1991, 39 States demanded such proof by requiring some form of what we shall call State Registration (of the Federal Permit). Those States typically would require truckers to file with a state agency evidence that each interstate truck was covered by a Federal Permit. They would require the trucker to pay a State Registration fee of up to $10 per truck. And they would issue a State Registration stamp that the trucker would affix to a multistate "bingo card" carried within the vehicle. See 49 CFR §§ 1023.32, 1023.33 (1990); *Yellow Transp.*, 537 U. S., at 39.

In 1991, Congress focused upon the fact that the "bingo card" system required a trucking company to obtain a separate stamp from each State through which an interstate truck traveled. It found this scheme inefficient and burdensome. See *id.*, at 39–40. And it enacted a statute setting forth a new system, the Single State Registration System (SSRS), which remains in effect today. Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), 49 U. S. C. § 14504. The SSRS allows a trucking company to fill out *one* set of forms in *one* State (the base State), and by doing so to register its Federal Permit in *every* participating State through which its trucks will travel. § 14504(c); 49 CFR § 367.4(b) (2004).

The SSRS statute says that the base State can demand: (1) proof of the trucking company's possession of a Federal Permit, (2) proof of insurance, (3) the name of an agent designated to receive "service of process," and (4) a total fee (charged for the filing of the proof of insurance) equal to the sum of the individual state fees. 49 U. S. C. §§ 14504(c)(2)(A)(i)–(iv); 49 CFR §§ 367.4(c)(1)–(4) (2004). Each individual state fee, it adds, cannot exceed the amount the State charged under the "bingo card" system, and in no event can it exceed $10 per truck. 49 U. S. C. § 14504(c)(2)(B)(iv)(III). After a truck owner registers, base state officials provide the owner with a receipt to be kept in the cab

of each registered truck. 49 CFR §§ 367.5(a), (b), (e) (2004). The base State distributes to each participating State its share of the total registration fee. § 367.6(a).

The SSRS statute specifies that a State may not impose any additional "registration requirement." It states specifically, in the statutory sentence at issue here, that when a State Registration requirement imposes further obligations, "the part in excess is an unreasonable burden." 49 U. S. C. § 14504(b). It adds that a State may not require "decals, stamps, cab cards, or any other means of registering . . . specific vehicles." § 14504(c)(2)(B)(iii). And it provides that the "charging or collection of any fee under this section that is not in accordance with the fee system established [in this provision] shall be deemed to be a burden on interstate commerce." § 14504(c)(2)(C). At the same time, the statute makes clear that a State that complies with the SSRS system need not fear Commerce Clause attack, for it says that a state requirement that an interstate truck "must register with the State" is "not an unreasonable burden on transportation," provided that "the State registration is completed" in accordance with the SSRS statute. § 14504(b).

B

The state law at issue here, § 478.2(2) of the Michigan Motor Carrier Act, reads as follows:

> "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state [*i. e.*, which has a Michigan license plate] and operating entirely in interstate commerce."

Related state rules and regulations require a carrier paying the $100 fee to identify each interstate truck by make, type, year, serial number, and unit number. See Equipment List Form P–344–T, App. to Defendant's Response to Plaintiffs' Motion for Summary Disposition in No. 95–15628–CM etc.

(Mich. Ct. Cl.) (hereinafter Equipment List Form P–344–T). They also make clear that, upon payment of the fee, the carrier will receive a decal that must be affixed to the truck. App. 24 (Affidavit of Pub. Serv. Comm'n. official Thomas R. Lonergan). And they provide that a carrier who pays this fee need not pay the $10 SSRS registration fee if the carrier chooses Michigan as its SSRS base State. See, *e. g.*, *id.*, at 67, n.; *Westlake Transp., Inc.* v. *Michigan Pub. Serv. Comm'n*, 255 Mich. App. 589, 603–604, n. 6, 662 N. W. 2d 784, 790–792, n. 6 (2003); Reply Brief for Petitioners 14–15, n. 8.

C

Petitioners are interstate trucking companies with trucks that bear Michigan license plates and operate entirely in interstate commerce. Hence they are subject to Michigan's $100 fee. MCL § 478.2(2) (West 2002). They asked a Michigan court to invalidate § 478.2(2) as pre-empted by the federal SSRS statute. 255 Mich. App., at 592, 662 N. W. 2d, at 789–790. The Michigan Court of Claims rejected their claim. *Id.*, at 593–594, 662 N. W. 2d, at 789–790. And the Michigan Court of Appeals affirmed. *Id.*, at 604, 662 N. W. 2d, at 795.

The Court of Appeals wrote that the $100 fee is a "regulatory fee"—a "fee imposed for the administration" of the State's Motor Carrier Act and for enforcement of Michigan "safety regulations." *Ibid.* As such, it falls outside the scope of the term "registration requirement" as used in the federal SSRS statute, 49 U. S. C. § 14504(b). 255 Mich. App., at 604, 662 N. W. 2d, at 795. The federal statute, according to the Michigan court, consequently does not pre-empt it. *Ibid.*

Petitioners sought leave to appeal to the Michigan Supreme Court; leave was denied. *Westlake Transp., Inc.* v. *Michigan Pub. Serv. Comm'n*, 469 Mich. 976, 673 N. W. 2d 752 (2003). We granted their petition for certiorari and consolidated the case with *American Trucking Assns., Inc.* v.

Michigan Pub. Serv. Comm'n, ante, p. 429, a case in which interstate truckers sought review of a separate Michigan fee. We now affirm the Michigan court's judgment in this case, though for other reasons.

II

A

The first legal question before us concerns the meaning of the federal statutory words "State registration requirement." They appear in a subsection that reads in relevant part as follows:

> "The requirement of a State that a motor carrier, providing [interstate transportation] in that State, must register with the State is not an unreasonable burden on transportation . . . when the State registration is completed under standards of the Secretary [of Transportation] under subsection (c). When a *State registration requirement* imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden." 49 U. S. C. § 14504(b) (emphasis added).

What is the scope of the italicized words?

Petitioners ask us to give these words a broad interpretation, sweeping within their ambit every state requirement involving some form of individualized registration that affects an interstate motor carrier. Brief for Petitioners 15 (federal statute's limits apply "to *all* interstate motor carriers compelled to register their operations with *any* State regulatory commission under any State law" (emphasis in original)). The United States argues for a somewhat narrower interpretation, submitting that the words apply to "state registration requirements that are imposed on interstate carriers *by reason of* their operation in interstate commerce." Brief for United States as *Amicus Curiae* 19–20 (emphasis in original). In our view, however, the language, read in context, is yet more narrow.

Reference to text, historical context, and purpose discloses that the words "State registration requirement" do not apply to *every* State Registration requirement that happens to cover interstate carriers, nor to *every* such requirement specifically focused on a trucking operation's interstate character. Rather, they apply only to those state requirements that concern *SSRS registration*—that is, registration with a State of evidence that a carrier possesses a Federal Permit, registration of proof of insurance, or registration of the name of an agent "for service of process." § 14504(c)(2)(A)(iv). Thus, the federal provision pre-empts only those state requirements that (1) concern the subject matter of the SSRS and (2) are "in excess" of the requirements that the SSRS imposes in respect to that subject matter. See § 14504(b).

To begin with, statutory language makes clear that the federal provision reaches no further. Section 14504(b)'s first sentence says that a state "requirement" that an interstate motor carrier must "register with the State is not an unreasonable burden . . . when the State registration is completed under standards of the Secretary under subsection (c)." *Ibid.* It is clear from the text as a whole that "State registration" cannot cover *all* registration requirements, but only some. Cf. *post*, at 464–465 (KENNEDY, J., dissenting). The first sentence's reference to the "standards of the Secretary" (as well as the focus of the entire statute) tells us which. Those "standards," set forth in subsection (c)—which is titled "Single State Registration System"—exclusively relate to State Registration of "evidence of" a Federal Permit, "proof of" insurance, and the "name of a local agent for service of process," and state fees "for the filing of proof of insurance." §§ 14504(c)(2)(A)(i)–(iv); § 14504(c)(2)(B)(iv). And the rest of the statute similarly deals exclusively with SSRS matters. See § 14504(a) ("standards" mean "the specification of forms and procedures required" to prove that a motor carrier is in compliance with federal requirements). Thus, the words "State registration" in the pre-emption provision's first sen-

tence refer only to state systems that seek evidence that a trucker has complied with specific, federally enumerated, *SSRS* obligations. Cf. 49 U. S. C. § 13908(d) (§ 14504's fees relate specifically to state efforts to obtain proof of insurance under the SSRS); §§ 13908(b)(2)–(3) (indicating that § 14504 refers to state requirements having this purpose).

How could the same words in the second sentence refer to something totally different? We have found no language here or elsewhere in the statute (which we reproduce in the Appendix, *infra*) suggesting that the term "State registration requirement" in sentence two refers to all State Registration requirements "imposed on interstate carriers *by reason of* their operation in interstate commerce." Brief for United States as *Amicus Curiae* 20 (emphasis in original). Indeed, to read the words "by reason of . . . " into § 14504, a linguistic stretch, would be wholly inconsistent with the statute's basic purposes, because it would leave a State free to implement a regulation in excess of specific SSRS limitations as long as it did not single out interstate carriers (say, a neutral rule that all truckers must pay $50, or $500, per truck for proof of insurance, or must designate multiple agents for service of process). See *post*, at 463 (KENNEDY, J., dissenting).

To avoid this severely incongruous result, the dissent (which adopts the Government's view) must resort to interpretive acrobatics. After first reading subsection (b) to say that a neutral base state requirement, despite being "in excess" of SSRS standards, is not an "unreasonable burden on" commerce, it then reads subsection (c) to say that such a requirement, *because* it is "in excess" of SSRS standards, is nonetheless prohibited by the statute (in effect, an unreasonable burden on commerce). *Post*, at 466–468. Aside from imposing significant complexities on the statute where otherwise none would exist, this reading stretches subsection (c)'s function beyond that which its structure and language will allow.

Similarly, we see no language elsewhere in the statute suggesting that the term "State registration requirement" refers to *any* kind of State Registration whatsoever that might affect interstate carriers. And even the Government concedes that certain registration obligations—those in "traditional areas of state regulation"—are beyond the pre-emptive reach of the statute. Brief for United States as *Amicus Curiae* 19. Finally, the implementing regulations do not support these broader constructions. See 49 CFR § 367.1 *et seq.* (2004).

Our reading of the text finds confirmation in historical context. Congress enacted § 14504 to simplify the old "bingo card" system. See *Yellow Transp.*, 537 U. S., at 39–40. Under the "bingo card" scheme, *each* State could independently demand the same separate filings (evidence of a Federal Permit, proof of insurance, and a service-of-process agent) as well as separate fees. 49 U. S. C. § 302(b)(2) (1976 ed.); § 11506 (1988 ed.); 49 CFR §§ 1023.11, 1023.21, 1023.32, 1023.51 (1990). Federal law governing that scheme placed no express constraints on any state filings or fees other than those concerning Federal Permit and insurance requirements. Indeed, federal regulations specified that the federal "bingo card" statute did not "affect" the "collection or [the] method of collection of taxes or fees by a State" from interstate truckers "for the operation of vehicles within" its "borders." § 1023.104. And they further provided that the statute did not "affect" state requirements "as to the external identification of vehicles to indicate the payment of a State tax or fee imposed for revenue purposes or for any other purpose" not governed by the "bingo card" system. § 1023.42.

When Congress created the new SSRS, it did not indicate (in the text, structure, or divinable purpose of the new provision) that the pre-emptive scope of the new scheme would be any broader than that of the old. See ISTEA, 105 Stat. 1914. The relevant differences between the SSRS and the

"bingo card" regime were that: (1) one State, rather than many, would collect the relevant filings; (2) one State, rather than many, would collect the relevant fees; and (3) these fees, limited to the same amount as before, would relate to filing of proof of insurance rather than to filing of the Federal Permit. Compare 49 U. S. C. § 11506 (1988 ed.) with § 14504 (2000 ed.); see also § 11506 (1988 ed., Supp. IV). These modifications merely sought more efficient, not greater, federal regulation. See *Yellow Transp., supra;* see also 49 U. S. C. §§ 13908(a), (d) (authorizing the Secretary to replace the SSRS with a yet more streamlined system and pre-empting only those State "insurance filing requirements or fees that *are for the same purposes* as filings or fees the Secretary requires under the new system" (emphasis added)). And while the new regulations implementing the SSRS do not explicitly exempt unrelated state requirements from the statute's pre-emptive reach, neither they nor the rulemaking that produced them suggest any change to pre-existing practice in this respect. See 49 CFR § 367.1 *et seq.* (2004); see also *Single State Insurance Registration,* 9 I. C. C. 2d 610 (1993) (Interstate Commerce Commission decision announcing new regulations); *Single State Insurance Registration,* No. MC–100 (Sub-No. 6), 1993 WL 17833 (I. C. C., Jan. 13, 1993) (proposing regulations, providing justifications, and soliciting further comments).

Finally, we have found nothing in the statute's basic purposes or objectives—improving the efficiency of the "bingo card" system and simplifying a uniform scheme for providing States with certain vital information—that either requires a broader reading of the statutory term, or that impliedly pre-empts other, non-SSRS-related state rules. Cf. *Geier* v. *American Honda Motor Co.,* 529 U. S. 861, 881 (2000) (federal statutes by implication pre-empt state law that stands "as an obstacle to the accomplishment and execution" of their federal objectives (internal quotation marks omitted)).

That is, we can find no indication that Congress sought to use this narrowly focused statute to forbid state fee or registration obligations that have nothing to do with basic SSRS (or earlier "bingo card") objectives—say, for example, a State Registration requirement related to compliance by interstate carriers with rules governing the introduction of foreign pests into the jurisdiction, or with a State's version of the Amber Alert system, or with size, weight, and safety standards. The Constitution's Commerce Clause may (or may not) forbid some such rules. But this statute—which identifies and regulates very specific items—says nothing about them, and there is no reason to believe that Congress wished to resolve *that* kind of Commerce Clause issue in this provision. Cf. 49 U. S. C. § 13908 (indicating that the SSRS may well be only a temporary system and similarly focusing on limited, federally enumerated requirements without discussing broad pre-emption).

We conclude, as we have said, that the term "State registration requirement," as used in the second sentence of the SSRS statute, covers only those State Registration requirements that concern the subject matter of that statutory provision, namely, the registration of a Federal Permit, proof of insurance, and the name of an agent for service of process. See *supra*, at 446–447. It neither explicitly nor implicitly reaches unrelated matters.

B

The second legal question involves the Michigan statute imposing the $100 fee on Michigan-plated trucks operating entirely in interstate commerce. MCL § 478.2(2) (West 2002). Do the requirements set forth in that statute concern the SSRS statute's subject matter? We think that they do not.

For one thing, the Michigan statute imposing the $100 fee makes no reference to evidence of a Federal Permit, to any insurance requirement, or to an agent for receiving service

of process. Nor, as far as we can tell, do any state rules related to the $100 fee require the filing of information about these matters. See Equipment List Form P–344–T (requiring information about truck make, type, year, unit number, and serial number).

For another thing, Michigan law imposed a separate fee on interstate motor carriers with trucks license plated in Michigan before the SSRS existed and before Michigan began to participate in the "bingo card" system. See App. 24–25; Plaintiffs' Second Motion for Partial Summary Disposition in No. 95–15628–CM etc. (Mich. Ct. Cl.), p. 5; Plaintiffs-Appellants' Brief on Appeal, in No. 226052 etc. (Mich. Ct. App.), pp. 5–6; MCL §478.7(4) (West 2002). Hence such a fee does not represent an effort somehow to circumvent the limitations imposed in connection with federal laws governing State Registration of Federal Permits.

Finally, Michigan rules provide that a Michigan-plated interstate truck choosing Michigan as its SSRS base State can apparently comply with Michigan's SSRS requirements even if it does not comply with Michigan's $100 fee requirement. The owner of that truck can fill out Michigan form RS–1, thereby providing Michigan with evidence that it has a Federal Permit. App. 65–66. It can also fill out form RS–2, on which it indicates the total SSRS fees it owes to all participating States whose borders the truck will cross. *Id.*, at 67. Upon submission of the two forms and payment of the fees, Michigan apparently will give the owner form RS–3, an SSRS receipt, a copy of which the owner can place in the vehicle of the truck, thereby complying with Michigan's (and all other participating States') SSRS-related "State registration requirements." If that owner fails to pay Michigan's $100 fee for that truck, the owner will not receive a state fee decal. But that owner will have violated only Michigan's $100 fee statute here at issue, MCL §478.2(2) (West 2002). Petitioners have provided us with nothing that suggests the

owner will have violated any other provision of Michigan law. See § 478.7(4). And they have not demonstrated that Michigan law in practice holds hostage a truck owner's SSRS compliance until the owner pays § 478.2(2)'s $100 fee.

On the other hand, we recognize that Michigan form RS–2, the form that lists all SSRS-participating States together with their SSRS-related fees, places an asterisk next to Michigan and states that "[v]ehicles base-plated in Michigan need not" pay any SSRS fee but "are required to have a $100.00" Michigan decal. App. 67. Michigan thereby forgives Michigan-plated interstate trucks (which must pay Michigan $100) payment of the $10 Michigan SSRS fee that would otherwise be due. And to that extent, there is a connection between the $100 fee and the SSRS.

Michigan appears to forgive its $10 SSRS fee, however, only for the Michigan-plated interstate trucks of a carrier that has chosen Michigan as its SSRS "base" State. See Reply Brief for Petitioners 14–15, n. 8. Michigan-plated trucks operating out of a different SSRS base State, say, Ohio, must pay the fee, which is remitted back to Michigan. Thus, the $10 reduction can be seen simply as an effort to provide modest, administratively efficient (because Michigan itself is handling both fees) recompense to those motor carriers that operate Michigan-plated trucks and choose Michigan as their SSRS base State. That subsidiary connection cannot transform Michigan's $100 fee, which exclusively involves non-SSRS subject matter (and was created for non-SSRS-related reasons), into a requirement that concerns the subject matter of the SSRS statute.

* * *

For these reasons, we conclude that 49 U. S. C. § 14504(b) does not pre-empt Michigan's $100 fee. The judgment of the Michigan Court of Appeals is affirmed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Title 49 U. S. C. § 14504 provides:

"Registration of motor carriers by a State

"(a) DEFINITIONS.—In this section, the terms 'standards' and 'amendments to standards' mean the specification of forms and procedures required by regulations of the Secretary to prove the lawfulness of transportation by motor carrier referred to in section 13501.

"(b) GENERAL RULE.—The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.

"(c) SINGLE STATE REGISTRATION SYSTEM.—

"(1) IN GENERAL.—The Secretary shall maintain standards for implementing a system under which—

"(A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;

"(B) the State of registration shall fully comply with standards prescribed under this section; and

"(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

"(2) SPECIFIC REQUIREMENTS.—

"(A) EVIDENCE OF FEDERAL REGISTRATION; PROOF OF INSURANCE; PAYMENT OF FEES.—Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration

State under such single State system may require a motor carrier registered by the Secretary under this part—

"(i) to file and maintain evidence of such Federal registration;

"(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

"(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

"(iv) to file the name of a local agent for service of process.

"(B) RECEIPTS; FEE SYSTEM.—The standards of the Secretary—

"(i) shall require that the registration State issue a receipt, in a form prescribed under the standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

"(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

"(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

"(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that—

"(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

"(II) minimizes the costs of complying with the registration system; and

"(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

"(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

"(C) PROHIBITED FEES.—The charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

"(D) LIMITATION ON PARTICIPATION BY STATES.—Only a State which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under part 1023 of title 49, Code of Federal Regulations, shall be eligible to participate as a registration State under this subsection or to receive any fee revenue under this subsection."

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Michigan Court of Appeals, in my view, erred in holding that Mich. Comp. Laws Ann. § 478.2(2) (West 2002) (hereinafter MCL) is not a registration requirement. *Westlake Transp., Inc.* v. *Michigan Pub. Serv. Comm'n*, 255 Mich. App. 589, 603–605, 662 N. W. 2d 784, 795 (2003). Our Court, too, errs by concluding that the term "State registration requirement" in 49 U. S. C. § 14504(b) includes only those state registration requirements that "concern the [same] subject matter" as the Single State Registration System (SSRS) established by § 14504(c). *Ante*, at 447, 451. This respectful dissent explains my reasons for rejecting these two holdings.

I

Title 49 U. S. C. § 14504(b) provides:

> "The requirement of a State that a motor carrier, providing [interstate transportation] in that State, must register with the State is not an unreasonable burden on transportation . . . when the State registration is completed under standards of the Secretary [of Transportation] under [§ 14504(c)]. When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden."

The dispositive question in the instant case is whether MCL § 478.2(2) is a "State registration requirement" within the meaning of the second sentence of 49 U. S. C. § 14504(b). The Michigan Court of Appeals said the answer is no because MCL § 478.2(2) is not a registration requirement at all. The Court also says the answer is no, but for a different reason. It concludes that, even though § 478.2(2) is a registration requirement, the term "registration requirement" in 49 U. S. C. § 14504(b) includes only the subset of registration requirements that concern the same subject matter as the SSRS. Neither the Court's reason, nor the different reason given by the Michigan Court of Appeals, is persuasive.

A

The Michigan Court of Appeals adopted a categorical rule: "If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee," not a registration fee. 255 Mich. App., at 605, 662 N. W. 2d, at 795. Proceeding to apply the rule so announced, the Court of Appeals held that the $100 fee imposed by MCL § 478.2(2) on Michigan-plated interstate carriers is a regulatory fee rather than a registration fee because the fee is "imposed for the administration of the [Michigan Motor Carrier Act], particularly covering costs of enforcing safety regulations." *Id.*, at 604, 662 N. W. 2d, at 795.

The majority affirms the judgment below, but "for other reasons." *Ante*, at 446. The Court's reluctance to adopt the Michigan Court of Appeals' rationale is understandable. MCL §478.2(2) and related state rules and regulations require a motor carrier that wants to operate Michigan-plated vehicles in interstate commerce in Michigan to fill out a form providing detailed identifying information for each vehicle and to pay a $100-per-vehicle fee. In return, the State provides the carrier with decals that it must place on its trucks. See *ante*, at 444–445. If this is not a "State registration requirement" in the general and ordinary sense of the term, it is hard to conceive of what is.

The Court of Appeals' holding would allow the State to convert any registration fee into a regulatory fee simply by declaring a regulatory purpose or spending some portion of the money collected on regulation or administration. The logic of this approach excludes from the coverage of 49 U. S. C. §14504(b) almost all state requirements, including those dealing with similar subject matter as the SSRS. The purpose of SSRS requirements, after all, is to regulate the interstate motor carrier industry; and the fees collected are used to administer the system. The Court's disapproval of the Michigan Court of Appeals' reasoning is implicit in the Court's decision to affirm on a different ground. *Ante*, at 446. Yet the Court's affirmance of the Court of Appeals' decision, coupled with the Court's failure to make its apparent disagreement with the reasoning explicit, will result in the Michigan Court of Appeals' broad rule surviving to work additional mischief in future cases, a most undesirable result in this area, where fees and regulatory requirements are so pervasive.

B

1

Although the Court appears to agree that MCL §478.2(2) imposes a state registration requirement on interstate motor carriers, it holds, nonetheless, that the provision is not preempted by 49 U. S. C. §14504(b). This, according to the

Court, is because the phrase "State registration requirement" in § 14504(b) refers not to state registration requirements generally, but only to those state registration requirements that concern the same subject matter as the SSRS: registration of a federal permit, proof of insurance, and designation of an agent for service of process. *Ante*, at 451. Section 14504(b) simply cannot bear the narrowing construction the Court seeks to impose upon it.

The first sentence of § 14504(b) authorizes States to impose registration requirements on interstate motor carriers if the registration "is completed under standards of the Secretary under [§ 14504(c)]," *i. e.*, under the SSRS. The second sentence of § 14504(b) pre-empts "a State registration requirement" that imposes "obligations in excess" of the SSRS. There ought to be no question that MCL § 478.2(2) is a state registration requirement. The Court seems to agree, at least when the phrase "State registration requirement" is used in its ordinary and general sense. It should also be apparent that the obligations imposed by § 478.2(2) are in excess of those authorized by the standards of the Secretary under 49 U. S. C. § 14504(c). The plain text of § 14504(b), then, would appear to pre-empt MCL § 478.2(2), at least when § 478.2(2) is considered in isolation.

The Court, however, departs from the text of the statute. Title 49 U. S. C. § 14504(b), by its terms, saves from pre-emption only one class of state registration requirements imposed on interstate motor carriers: those completed under standards of the Secretary under § 14504(c), *i. e.*, those that are authorized under the SSRS. To this subset the Court adds a second class of state registration requirements saved from pre-emption: those that concern subject matters not covered under § 14504(c). The problem, of course, is that the statute simply does not provide for the exemption the Court invents. There is no basis in the statutory text or structure for adding this limitation, and the Court cannot carry its heavy burden to show why the language Congress used in § 14504(b) should not be given its ordinary meaning.

The Court makes only one textual argument for the limitation it superimposes on § 14504(b)'s second sentence. The second sentence, the Court reasons, refers to the same set of state registration requirements discussed in the first sentence. It must follow, the Court says, that because the first sentence of § 14504(b) refers to SSRS registration, the phrase "State registration requirement" in the second sentence refers only to state registration requirements that concern the same subject matter as the SSRS. *Ante*, at 447–448.

The Court's premise is faulty. The two terms in the first sentence—"requirement of a State that [an interstate motor carrier] must register" and "registration requirement"—are not, when taken by themselves, limited to state registration requirements concerning the same "subject matter" as the SSRS. These terms, like the term "State registration requirement" in the second sentence of § 14504(b), refer generally to any state requirement that an interstate motor carrier register with the State. No narrower reading is necessary to make perfect sense of each of § 14504(b)'s two sentences and of how they operate together. The first sentence of § 14504(b) declares that the subset of state registration requirements consisting of those requirements authorized under the SSRS—*i. e.*, requirements "completed under standards of the Secretary under [§ 14504(c)]"—are not pre-empted. The second sentence of § 14504(b) says that all other state registration requirements for interstate motor carriers are pre-empted. It is difficult to understand the Court's mighty struggle to resist this simple, direct reading of the statutory language.

The Court also observes that there is no language elsewhere in the statute or in the implementing regulations suggesting that "State registration requirement" in § 14504(b) refers to all types of state registration requirements imposed on interstate motor carriers, and the Court asserts that even

the United States concedes that certain registration obligations in traditional areas of state regulation are beyond the statute's pre-emptive reach. *Ante*, at 449. The first claim is irrelevant and the second is wrong. Section 14504(b) itself makes clear its pre-emptive scope, and confirmation by other statutory provisions or administrative regulations is unnecessary. And, while the United States did say that § 14504(b) was not "intended to preempt state laws and fees in traditional areas of state regulation," the reason the United States believes this is so is because § 14504(b) does not pre-empt general registration requirements that do not apply specifically to interstate motor carriers. Brief as *Amicus Curiae* 19–20.

3

Perhaps sensing the weakness of its textual argument, the Court turns to statutory history. The Court is correct to say that, before the enactment of § 14504(b) and the SSRS, federal law did not pre-empt state filings or fees other than those concerning federal permit and insurance requirements. *Ante*, at 449. Pre-SSRS federal regulations, furthermore, specified that the federal statute did not affect the power of States to collect other fees from interstate motor carriers or to require decals indicating payment of these fees. *Ibid.* This is beside the point, however. The extent of pre-emption before enactment of § 14504(b) tells us little about § 14504(b)'s pre-emptive effect. Similarly, the fact that pre-SSRS federal regulations preserved other state registration requirements is of minimal significance when, as the Court admits, the new regulations contain no such provisions. *Ante*, at 450. If anything, the failure to repromulgate regulations saving other state registration fees from pre-emption suggests that the federal agency charged with implementing the SSRS did think that § 14504(b) expanded the scope of federal pre-emption.

The Court's meaning is therefore obscure when it declares that Congress "did not indicate (in the text, structure, or

divinable purpose of the new provision) that the pre-emptive scope of the new scheme would be any broader than that of the old." *Ante*, at 449. Congress did indicate an expansion of federal pre-emption in § 14504(b)'s "text" and "structure"—it did so by replacing a narrow pre-emption clause with a broad pre-emption clause. Congress is not required to say, "We really mean it." Cf. *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. 50, 73 (2004) (SCALIA, J., dissenting) ("I hardly think it 'scant indication' of intent to alter [the meaning of a statute] that Congress *amended the text of the statute*" (emphasis in original)).

Perhaps the Court means to suggest that what appears to be the plain meaning of § 14504(b) is put in doubt by the fact that the predecessor statute's pre-emptive scope was much more limited. Comparison with predecessor statutes, however, is permissible only to resolve statutory ambiguity that exists independent of the comparison with the predecessor statute; comparison with predecessor statutes cannot be used to create ambiguity about the meaning of an otherwise clear statute. *Lamie* v. *United States Trustee*, 540 U. S. 526, 533–535 (2004); see also *Koons Buick Pontiac GMC, Inc.*, 543 U. S., at 66–67 (KENNEDY, J., concurring); *id.*, at 67 (THOMAS, J., concurring in judgment); *id.*, at 73 (SCALIA, J., dissenting).

4

The Court's final reason for imposing its narrowing construction on § 14504(b) is that the Court has found "nothing in the statute's basic purposes . . . that . . . requires a broader reading of the statutory term . . . ." *Ante*, at 450. In the Court's view the only purpose of § 14504 is to make minor improvements in the efficiency of the old bingo card system. *Ante*, at 449–450. The Court makes no convincing argument that § 14504(b)'s purpose was so limited. The Court, furthermore, does not explain why the statute's basic purposes require the Court's artificially narrow reading of the

facially broad statutory command. The most the Court is willing to say is that it "can find no indication," *ante*, at 451, that when Congress said "State registration requirement," it meant "State registration requirement." So it says Congress must have meant "State registration requirement concerning the same subject matter as the SSRS." The text of § 14504(b), however, does not admit of the qualifications the Court adds to it. The Court's argument from statutory purpose has no basis.

The Court suggests that if Congress intended § 14504(b) to have the broad pre-emptive effect required by the text, Congress would have more clearly indicated that intention. *Ibid.* ("[W]e can find no indication that Congress sought" to pre-empt requirements not related to SSRS subject matter). It is not entirely clear what sort of additional indication of congressional purpose the Court is looking for. The text, as noted above, does provide an indication of Congress' intent. Perhaps the Court is troubled by the absence of statements in the legislative history endorsing § 14504(b)'s expansion of federal pre-emption. The lack of confirmatory legislative history, however, is not a legitimate reason for imposing an artificial narrowing construction on broad but clear statutory text. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980). See also *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 385, n. 2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning"); *Chisom* v. *Roemer*, 501 U. S. 380, 406 (1991) (SCALIA, J., dissenting) ("We are here to apply the statute, not legislative history, and certainly not the absence of legislative history").

II

A

In my submission, the phrase "State registration requirement" in § 14504(b) cannot be read as limited to state registration requirements that concern one particular subject matter. It should be noted, however, that this phrase is ambiguous in a different respect. Section 14504(b) might be read, on the one hand, to exempt interstate motor carriers from any non-SSRS state registration requirement, including general requirements that apply to all motor carriers or to some other set of entities. On the other hand, § 14504(b) might be read to pre-empt only those non-SSRS registration requirements that apply specifically to interstate motor carriers. That is, § 14504(b) might come into play only if being an interstate motor carrier is a necessary or sufficient condition for imposition of a state registration requirement. The United States takes the latter view of the statute, Brief as *Amicus Curiae* 17–22, and I am of the same opinion.

Though the phrase "State registration requirement" in the second sentence of § 14504(b) is not qualified, it is clear from context that this term refers to a "requirement of a State that a motor carrier, providing [interstate transportation,] must register with the State," the more specific term that appears in § 14509(b)'s first sentence. It is grammatically possible to read the statutory command as exempting interstate motor carriers from all registration requirements other than the SSRS, but that reading would lead to absurd results. It would suggest, for example, that interstate motor carriers with a principal place of business in Michigan do not have to register their presence for purposes of state tax collection. In context, the more natural and sensible reading of the phrase "requirement of a State that a motor carrier, providing [interstate transportation,] must register with the State" includes only those registration requirements that

are triggered specifically by the fact that the entity in question is an interstate motor carrier.

Because § 14504(b) pre-empts state registration requirements that single out interstate carriers, but not general state registration requirements that apply to interstate carriers only incidentally, my analysis of § 14504(b) does not necessarily mean the Court's ultimate conclusion in this case is incorrect. Respondents contend that MCL § 478.2(2) applies only to trucks with Michigan license plates, and that § 478.2(2) should be considered together with § 478.2(1), which imposes a $100 fee on every truck doing intrastate business within Michigan. According to respondents, then, 49 U. S. C. § 14504(b) does not come into play because interstate carriers are not singled out; Michigan imposes the same $100 fee on all for-hire motor vehicles license plated in Michigan. Brief for Respondents 44–45. Petitioners and the United States take issue with this argument. Reply Brief for Petitioners 10–14; Brief for United States as *Amicus Curiae* 24–29.

In my view it is not necessary to reach this question. The Michigan Court of Appeals resolved the case on the incorrect theory that a fee is not a registration fee if its purpose is to regulate the industry. Given its erroneous view of the statute, the proper course should be to vacate the Court of Appeals' decision and remand for further proceedings. Remanding the case would allow the Michigan courts to consider the competing arguments in light of the correct legal interpretation of 49 U. S. C. § 14504(b). Respondents would, at that stage, be able to advance their arguments that MCL § 478.2(2) is not pre-empted when it is considered in conjunction with § 478.2(1) or any other aspect of the statutory scheme that bears on whether Michigan imposes registration requirements specifically on interstate motor carriers beyond those authorized under the SSRS.

B

The Court insists that to read "requirement that a motor carrier providing [interstate transportation] must register with the State" as including only those requirements that apply specifically to interstate motor carriers would be "wholly inconsistent with the statute's basic purposes, because it would leave a State free to implement a regulation in excess of specific SSRS limitations as long as it did not single out interstate carriers . . . ." *Ante*, at 448. The Court is correct that, under my interpretation, 49 U. S. C. § 14504(b) would not pre-empt general, neutral requirements, even if they dealt with subject matter similar to that covered by the SSRS. The Court is wrong, however, to suggest this therefore means an SSRS could collect from interstate motor carriers a $500 fee for proof of insurance or require designation of multiple agents for service of process, as long as the requirement in question applied evenhandedly to all motor carriers. The Court errs because it fails to give adequate consideration to the restrictions imposed by § 14504(c).

Section 14504(c)(2)(A) declares that "only a State acting in its capacity as [a] registration State under [the SSRS] may require a motor carrier registered by the Secretary under [the SSRS]" to file proof of federal registration and proof of insurance, to collect fees for filing proof of insurance, and to maintain a local agent for service of process. Section 14504(c)(2)(B) constrains the SSRS registration requirements and fees the SSRS registration State can impose on interstate motor carriers. These sections contain an ambiguity similar to that which affects § 14504(b). Context, however, suggests that the ambiguity should be resolved differently. The best interpretation of § 14504(c), in my submission, is that no State participating in the SSRS other than an interstate motor carrier's designated SSRS registration State may impose requirements of the sort listed in § 14504(c)(2)(A) on that carrier, even if the requirement is

general and applies to all motor carriers. The SSRS registration State, furthermore, may only impose on registered interstate motor carriers requirements related to those listed in §§ 14504(c)(2)(A)(i)–(iv) if the State conforms to the restrictions in § 14504(c)(2)(B).

Taken together, the general pre-emption provision in § 14504(b) and the specific limitations on SSRS registration States in § 14504(c) establish a rational regulatory scheme. Whether or not a State participates in the SSRS, it cannot impose a registration requirement that singles out interstate motor carriers unless that requirement is authorized under the SSRS. States that participate in the SSRS may impose general, neutral registration requirements that happen to affect interstate motor carriers unless those requirements are inconsistent with the specific mandates of the SSRS related to proof of insurance, proof of federal permit, fees, and service of process. Non-SSRS States may impose any general, neutral registration requirement, even if they require interstate motor carriers, among others, to file proof of insurance or maintain a local agent for service of process.

The Court's interpretation leads to a less sensible scheme. According to the Court, that statute permits States to impose on interstate carriers any number of onerous requirements so long as these requirements are not explicitly linked to the subjects covered by the SSRS. The Court's interpretation, furthermore, means that those States which are excluded from the SSRS under § 14504(c)(2)(D) may not apply general state registration requirements to interstate motor carriers if the requirements concern proof of insurance or registration of an agent for service of process. Under the Court's interpretation, the statute does not pre-empt state regulations that single out interstate carriers for special burdens well beyond what the SSRS allows, but it does prevent non-SSRS States from applying a number of modest, even-handed registration requirements to interstate carriers, even

though the SSRS is not available to these States. That implausible result is not demanded by the statute's basic purposes.

* * *

Instead of heeding what Congress actually said, the Court relies on flawed textual analysis and dubious inferences from legislative silence to impose the Court's view of what it thinks Congress probably wanted to say. In my view, this is a mistake. Other arguments, not considered by the Michigan Court of Appeals or by our Court, might support the ultimate outcome in this case. These arguments, however, ought to be addressed on remand.

Syllabus

KELO ET AL. *v.* CITY OF NEW LONDON ET AL.

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 04–108. Argued February 22, 2005—Decided June 23, 2005

After approving an integrated development plan designed to revitalize its ailing economy, respondent city, through its development agent, purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings when petitioners, the owners of the rest of the property, refused to sell. Petitioners brought this state-court action claiming, *inter alia*, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of some of the properties, but denying relief as to others. Relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, and *Berman* v. *Parker*, 348 U. S. 26, the Connecticut Supreme Court affirmed in part and reversed in part, upholding all of the proposed takings.

Held: The city's proposed disposition of petitioners' property qualifies as a "public use" within the meaning of the Takings Clause. Pp. 477–490.

(a) Though the city could not take petitioners' land simply to confer a private benefit on a particular private party, see, *e. g.*, *Midkiff*, 467 U. S., at 245, the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted "to benefit a particular class of identifiable individuals," *ibid.* Moreover, while the city is not planning to open the condemned land—at least not in its entirety—to use by the general public, this "Court long ago rejected any literal requirement that condemned property be put into use for the . . . public." *Id.*, at 244. Rather, it has embraced the broader and more natural interpretation of public use as "public purpose." See, *e. g.*, *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 158–164. Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power. *Berman*, 348 U. S. 26; *Midkiff*, 467 U. S. 229; *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986. Pp. 477–483.

(b) The city's determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation is entitled to deference. The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including,

but not limited to, new jobs and increased tax revenue. As with other exercises in urban planning and development, the city is trying to coordinate a variety of commercial, residential, and recreational land uses, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the city has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the plan's comprehensive character, the thorough deliberation that preceded its adoption, and the limited scope of this Court's review in such cases, it is appropriate here, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment. Pp. 483–484.

(c) Petitioners' proposal that the Court adopt a new bright-line rule that economic development does not qualify as a public use is supported by neither precedent nor logic. Promoting economic development is a traditional and long-accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized. See, *e. g.*, *Berman*, 348 U. S., at 33. Also rejected is petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule would represent an even greater departure from the Court's precedent. *E. g.*, *Midkiff*, 467 U. S., at 242. The disadvantages of a heightened form of review are especially pronounced in this type of case, where orderly implementation of a comprehensive plan requires all interested parties' legal rights to be established before new construction can commence. The Court declines to second-guess the wisdom of the means the city has selected to effectuate its plan. *Berman*, 348 U. S., at 35–36. Pp. 484–490.

268 Conn. 1, 843 A. 2d 500, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 490. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 494. THOMAS, J., filed a dissenting opinion, *post*, p. 505.

Scott G. Bullock argued the cause for petitioners. With him on the briefs were *William H. Mellor*, *Dana Berliner*, and *Scott W. Sawyer*.

Counsel

Wesley W. Horton argued the cause for respondents. With him on the brief were *Thomas J. Londregan, Jeffrey T. Londregan, Edward B. O'Connell,* and *David P. Condon.**

---

*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *Michael M. Berger, Nancy McDonough,* and *Gideon Kanner;* for America's Future, Inc., et al. by *Andrew L. Schlafly;* for the Becket Fund for Religious Liberty by *Anthony R. Picarello, Jr.,* and *Roman P. Storzer;* for the Better Government Association et al. by *Barry Levenstam* and *Jeremy M. Taylor;* for the Cascade Policy Institute et al. by *James L. Huffman;* for the Cato Institute by *Richard A. Epstein, Timothy Lynch,* and *Robert A. Levy;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman;* for Develop Don't Destroy (Brooklyn), Inc., et al. by *Norman Siegel* and *Steven Hyman;* for the Goldwater Institute et al. by *Mark Brnovich;* for King Ranch, Inc., by *Michael Austin Hatchell* and *William Scott Hastings;* for the Mountain States Legal Foundation et al. by *William Perry Pendley* and *Joseph F. Becker;* for the National Association for the Advancement of Colored People et al. by *Jason M. Freier, Dennis Courtland Hayes, Michael Schuster,* and *Douglas E. Gershuny;* for the National Association of Home Builders et al. by *Mary Lynn Pickel, John J. Delaney, Laurene K. Janik,* and *Ralph W. Holmen;* for New London Landmarks, Inc., et al. by *Michael E. Malamut, Andrew R. Grainger,* and *Martin J. Newhouse;* for the New London R. R. Co., Inc., by *Michael D. O'Connell;* for the Property Rights Foundation of America, Inc., by *H. Christopher Bartolomucci* and *Jonathan L. Abram;* for the Reason Foundation by *Mark A. Perry* and *Thomas H. Dupree, Jr.;* for the Rutherford Institute by *John W. Whitehead;* for the Tidewater Libertarian Party by *Stephen Merrill;* for David L. Callies et al. by *Mr. Callies, pro se;* for Mary Bugryn Dudko et al. by *James S. Burling;* for Jane Jacobs by *Robert S. Getman;* for Laura B. Kohr et al. by *Joel R. Burcat* and *John C. Snyder;* for John Norquist by *Frank Schnidman;* and for Robert Nigel Richards et al. by *Kenneth R. Kupchak* and *Robert H. Thomas.*

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut by *Richard Blumenthal,* Attorney General, and *Robert D. Snook,* Assistant Attorney General; for the State of Vermont et al. by *William H. Sorrell,* Attorney General of Vermont, and *Bridget C. Asay* and *S. Mark Sciarrotta,* Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *M. Jane Brady* of Delaware, *Robert J. Spagnoletti* of the District of Columbia, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *J. Joseph Curran, Jr.,* of

JUSTICE STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A. 2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[1]

Maryland, *Mike McGrath* of Montana, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick C. Lynch* of Rhode Island, *Lawrence E. Long* of South Dakota, and *Paul G. Summers* of Tennessee; for the American Planning Association et al. by *Thomas W. Merrill* and *John D. Echeverria;* for Brooklyn United for Innovative Local Development (BUILD) et al. by *David T. Goldberg* and *Sean H. Donahue;* for the California Redevelopment Association by *Iris P. Yang;* for the City of New York by *Michael A. Cardozo, Leonard J. Koerner, Edward F. X. Hart,* and *Jane L. Gordon;* for the Connecticut Conference of Municipalities et al. by *Allan B. Taylor* and *Michael P. Shea;* for the K. Hovnanian Companies, LLC, by *Paul H. Schneider;* for the Massachusetts Chapter of the National Association of Industrial and Office Properties by *R. Jeffrey Lyman* and *Richard A. Oetheimer;* for the Mayor and City Council of Baltimore by *Ralph S. Tyler III;* for the National League of Cities et al. by *Richard Ruda, Timothy J. Dowling,* and *J. Peter Byrne;* for the New York State Urban Development Corp. d/b/a Empire State Development Corp. by *Joseph M. Ryan, John R. Casolaro, Susan B. Kalib,* and *Jack Kaplan;* and for Robert H. Freilich et al. by *Mr. Freilich, pro se.*

[1] "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226 (1897).

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[2] Upon obtaining state-level approval, the NLDC

[2] Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the area, which varied in extensiveness and emphasis. The Office of Policy and Management, one of the primary state agencies undertaking the review, made findings

finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U. S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. App. 109–113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create

---

that the project was consistent with relevant state and municipal development policies. See App. 89–95.

leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. §8–188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. §8–193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.[3]

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties lo-

[3] In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.

cated in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). App. to Pet. for Cert. 343–350.[4]

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. § 8–186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18–28, 843 A. 2d, at 515–521. Next, relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), and *Berman* v. *Parker*, 348 U. S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82–84, 843 A. 2d, at 552–553, and, second, whether the takings were for "reasonably foreseeable needs," *id.*, at 93–94, 843 A. 2d, at 558–559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently

---

[4] While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A. 2d 500, 509–510, 540 (2004).

definite and had been given "reasonable attention" during the planning process. *Id.*, at 120–121, 843 A. 2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U. S. 965 (2004).

III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 U. S., at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co.* v. *Nebraska*,

164 U. S. 403 (1896).[5] Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. 268 Conn., at 54, 843 A. 2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.[6] Therefore, as was true of the statute challenged in *Midkiff*, 467 U. S., at 245, the City's development plan was not adopted "to benefit a particular class of identifiable individuals."

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all com-

---

[5] See also *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them" (emphasis deleted)).

[6] See 268 Conn., at 159, 843 A. 2d, at 595 (Zarella, J., concurring in part and dissenting in part) ("The record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront"). And while the City intends to transfer certain of the parcels to a private developer in a long-term lease—which developer, in turn, is expected to lease the office space and so forth to other private tenants—the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown.

ers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." *Id.*, at 244. Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e. g.*, what proportion of the public need have access to the property? at what price?),[7] but it proved to be impractical given the diverse and always evolving needs of society.[8] Accordingly,

[7] See, *e. g.*, *Dayton Gold & Silver Mining Co.* v. *Seawell*, 11 Nev. 394, 410, 1876 WL 4573, *11 (1876) ("If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad").

[8] From upholding the Mill Acts (which authorized manufacturers dependent on power-producing dams to flood upstream lands in exchange for just compensation), to approving takings necessary for the economic development of the West through mining and irrigation, many state courts either circumvented the "use by the public" test when necessary or abandoned it completely. See Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B. U. L. Rev. 615, 619–624 (1940) (tracing this development and collecting cases). For example, in rejecting the "use by the public" test as overly restrictive, the Nevada Supreme Court stressed that "[m]ining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valleys could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. . . . The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of

when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." See, *e. g.*, *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 158–164 (1896). Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, 531 (1906).[9] We have repeatedly and consistently rejected that narrow test ever since.[10]

The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman* v. *Parker*, 348 U. S. 26 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

---

any individual or individuals." *Dayton Gold & Silver Mining Co.*, 11 Nev., at 409–410, 1876 WL, at *11.

[9] See also *Clark* v. *Nash*, 198 U. S. 361 (1905) (upholding a statute that authorized the owner of arid land to widen a ditch on his neighbor's property so as to permit a nearby stream to irrigate his land).

[10] See, *e. g.*, *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32 (1916) ("The inadequacy of use by the general public as a universal test is established"); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1014–1015 (1984) ("This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public").

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. *Id.*, at 31. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. *Id.*, at 34. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." *Id.*, at 35. The public use underlying the taking was unequivocally affirmed:

> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.*, at 33.

In *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A

and transfer it to B solely for B's private use and benefit." *Id.*, at 235 (internal quotation marks omitted). Reaffirming *Berman*'s deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. 467 U. S., at 241–242. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "[I]t is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use. *Id.*, at 244.

In that same Term we decided another public use case that arose in a purely economic context. In *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), the Court dealt with provisions of the Federal Insecticide, Fungicide, and Rodenticide Act under which the Environmental Protection Agency could consider the data (including trade secrets) submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data. We acknowledged that the "most direct beneficiaries" of these provisions were the subsequent applicants, *id.*, at 1014, but we nevertheless upheld the statute under *Berman* and *Midkiff*. We found sufficient Congress' belief that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition. 467 U. S., at 1015.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See *Hairston* v. *Danville & Western R. Co.*, 208 U. S. 598, 606–607 (1908)

(noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people").[11] For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development,[12] the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To ef-

---

[11] See also *Clark*, 198 U. S., at 367–368; *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, 531 (1906) ("In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong"); *O'Neill* v. *Leamer*, 239 U. S. 244, 253 (1915) ("States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect").

[12] Cf. *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

fectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, see, *e. g.*, *Strickley*, 200 U. S. 527; in *Berman*, we endorsed the purpose of transforming a blighted area into a "well-balanced" community through redevelopment, 348 U. S., at 33;[13] in *Midkiff*,

---

[13] It is a misreading of *Berman* to suggest that the only public use upheld in that case was the initial removal of blight. See Reply Brief for Petitioners 8. The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future. See 348 U. S., at 34–35 ("It was not enough, [the experts] believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums. . . . The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the

we upheld the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the State's residential land market," 467 U. S., at 242; and in *Monsanto*, we accepted Congress' purpose of eliminating a "significant barrier to entry in the pesticide market," 467 U. S., at 1014–1015. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. In *Monsanto*, we recognized that the "most direct beneficiaries" of the data-sharing provisions were the subsequent pesticide applicants, but benefiting them in this way was necessary to promoting competition in the pesticide market. 467 U. S., at 1014.[14] The owner of the department store in

---

cycle of decay of the area could be controlled and the birth of future slums prevented"). Had the public use in *Berman* been defined more narrowly, it would have been difficult to justify the taking of the plaintiff's nonblighted department store.

[14] Any number of cases illustrate that the achievement of a public good often coincides with the immediate benefiting of private parties. See, *e. g.*, *National Railroad Passenger Corporation* v. *Boston & Maine Corp.*, 503 U. S. 407, 422 (1992) (public purpose of "facilitating Amtrak's rail service" served by taking rail track from one private company and transferring it to another private company); *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216 (2003) (provision of legal services to the poor is a valid public

Berman objected to "taking from one businessman for the benefit of another businessman," 348 U. S., at 33, referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment.[15] Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.*, at 33–34.[16]

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to

---

purpose). It is worth noting that in *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), *Monsanto*, and *Boston & Maine Corp.*, the property in question retained the same use even after the change of ownership.

[15] Notably, as in the instant case, the private developers in *Berman* were required by contract to use the property to carry out the redevelopment plan. See 348 U. S., at 30.

[16] Nor do our cases support JUSTICE O'CONNOR's novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some "harmful property use." *Post*, at 501 (dissenting opinion). There was nothing "harmful" about the nonblighted department store at issue in *Berman*, 348 U. S. 26; see also n. 13, *supra;* nothing "harmful" about the lands at issue in the mining and agriculture cases, see, *e. g.*, *Strickley*, 200 U. S. 527; see also nn. 9, 11, *supra;* and certainly nothing "harmful" about the trade secrets owned by the pesticide manufacturers in *Monsanto*, 467 U. S. 986. In each case, the public purpose we upheld depended on a private party's *future* use of the concededly nonharmful property that was taken. By focusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause. See U. S. Const., Amdt. 5 ("[N]or shall private property be taken for public use, without just compensation"). JUSTICE O'CONNOR's intimation that a "public purpose" may not be achieved by the action of private parties, see *post*, at 500–501, confuses the *purpose* of a taking with its *mechanics*, a mistake we warned of in *Midkiff*, 467 U. S., at 244. See also *Berman*, 348 U. S., at 33–34 ("The public end may be as well or better served through an agency of private enterprise than through a department of government").

citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot,[17] the hypothetical cases posited by petitioners can be confronted if and when they arise.[18] They do not warrant the crafting of an artificial restriction on the concept of public use.[19]

Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from

---

[17] Courts have viewed such aberrations with a skeptical eye. See, *e. g.*, *99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (CD Cal. 2001); cf. *Cincinnati* v. *Vester*, 281 U. S. 439, 448 (1930) (taking invalid under state eminent domain statute for lack of a reasoned explanation). These types of takings may also implicate other constitutional guarantees. See *Village of Willowbrook* v. *Olech*, 528 U. S. 562 (2000) *(per curiam)*.

[18] Cf. *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits").

[19] A parade of horribles is especially unpersuasive in this context, since the Takings Clause largely "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 545 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). Speaking of the takings power, Justice Iredell observed that "[i]t is not sufficient to urge, that the power may be abused, for, such is the nature of all power,—such is the tendency of every human institution: and, it might as fairly be said, that the power of taxation, which is only circumscribed by the discretion of the Body, in which it is vested, ought not to be granted, because the Legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutory confidence." *Calder*, 3 Dall., at 400 (opinion concurring in result).

our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Midkiff*, 467 U. S., at 242–243.[20] Indeed, earlier this Term we explained why similar practical concerns (among others) undermined the use of the "substantially advances" formula in our regulatory takings doctrine. See *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 544 (2005) (noting that this formula "would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies"). The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what

---

[20] See also *Boston & Maine Corp.*, 503 U. S., at 422–423 ("[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives"); *Monsanto*, 467 U. S., at 1015, n. 18 ("Monsanto argues that EPA and, by implication, Congress, misapprehended the true 'barriers to entry' in the pesticide industry and that the challenged provisions of the law create, rather than reduce, barriers to entry. . . . Such economic arguments are better directed to Congress. The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective").

lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman*, 348 U. S., at 35–36.

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.[21] We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law,[22] while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.[23] As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.[24] This Court's authority,

[21] The *amici* raise questions about the fairness of the measure of just compensation. See, *e. g.*, Brief for American Planning Association et al. as *Amici Curiae* 26–30. While important, these questions are not before us in this litigation.

[22] See, *e. g.*, *County of Wayne* v. *Hathcock*, 471 Mich. 445, 684 N. W. 2d 765 (2004).

[23] Under California law, for instance, a city may only take land for economic development purposes in blighted areas. Cal. Health & Safety Code Ann. §§ 33030–33037 (West 1999). See, *e. g.*, *Redevelopment Agency of Chula Vista* v. *Rados Bros.*, 95 Cal. App. 4th 309, 115 Cal. Rptr. 2d 234 (2002).

[24] For example, some argue that the need for eminent domain has been greatly exaggerated because private developers can use numerous techniques, including secret negotiations or precommitment strategies, to overcome holdout problems and assemble lands for genuinely profitable

however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

The judgment of the Supreme Court of Connecticut is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the opinion for the Court and add these further observations.

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U. S. Const., Amdt. 5, as long as it is "rationally related to a conceivable public purpose." *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 241 (1984); see also *Berman* v. *Parker*, 348 U. S. 26 (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses, see, *e. g.*, *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313–314 (1993); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

---

projects. See Brief for Jane Jacobs as *Amicus Curiae* 13–15; see also Brief for John Norquist as *Amicus Curiae*. Others argue to the contrary, urging that the need for eminent domain is especially great with regard to older, small cities like New London, where centuries of development have created an extreme overdivision of land and thus a real market impediment to land assembly. See Brief for Connecticut Conference of Municipalities et al. as *Amici Curiae* 13, 21; see also Brief for National League of Cities et al. as *Amici Curiae*.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 446–447, 450 (1985); *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 533–536 (1973). As the trial court in this case was correct to observe: "Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose—economic advantage to a city sorely in need of it—is only incidental to the benefits that will be confined on private parties of a development plan." App. to Pet. for Cert. 263. See also *ante*, at 477–478.

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to . . . the developer [*i. e.*, Corcoran Jennison], and private businesses which may eventually locate in the plan area [*e. g.*, Pfizer], and in that regard, only of incidental benefit to the city." App. to Pet. for Cert. 261. The trial court considered testimony from government officials and corporate officers, *id.*, at 266–271; documentary evidence of communications between these parties, *ibid.*; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern, *id.*, at 272–273, 278–279; the substantial commitment of public

funds by the State to the development project before most of the private beneficiaries were known, *id.*, at 276; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, *id.*, at 273, 278; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented, *id.*, at 278.

The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." *Id.*, at 276. Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that . . . [respondents] were motivated by a desire to aid [other] particular private entities." *Id.*, at 278. See also *ante*, at 478. Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. 268 Conn. 1, 159, 843 A. 2d 500, 595 (2004) (Zarella, J., concurring in part and dissenting in part). This case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause.

Petitioners and their *amici* argue that any taking justified by the promotion of economic development must be treated by the courts as *per se* invalid, or at least presumptively invalid. Petitioners overstate the need for such a rule, however, by making the incorrect assumption that review under *Berman* and *Midkiff* imposes no meaningful judicial limits on the government's power to condemn any property it likes. A broad *per se* rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. Cf. *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 549–550 (1998) (KENNEDY, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me no departure from *Berman* and *Midkiff* is appropriate here. This taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression, and the projected economic benefits of the project cannot be characterized as *de minimis*. The identities of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes. In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case.

* * *

For the foregoing reasons, I join in the Court's opinion.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

> "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (emphasis deleted).

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i. e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

I

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with

his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." App. to Pet. for Cert. 5.

Petitioners own properties in two of the plan's seven parcels—Parcel 3 and Parcel 4A. Under the plan, Parcel 3 is slated for the construction of research and office space as a market develops for such space. It will also retain the existing Italian Dramatic Club (a private cultural organization) though the homes of three plaintiffs in that parcel are to be demolished. Parcel 4A is slated, mysteriously, for "'park support.'" *Id.*, at 345–346. At oral argument, counsel for respondents conceded the vagueness of this proposed use, and offered that the parcel might eventually be used for parking. Tr. of Oral Arg. 36.

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power. Petitioners maintain that the Fifth Amendment prohibits the NLDC from condemning their properties for the sake of an economic development plan. Petitioners are not holdouts; they do not seek increased compensation, and

none is opposed to new development in the area. Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment. While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright* v. *United States*, 302 U. S. 583, 588 (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "[T]he taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216, 231–232 (2003).

These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 325 (1893); see also *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960). The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security. Cf. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 336 (2002) ("The concepts of 'fairness and justice' . . . underlie the Takings Clause").

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. See *Cincinnati* v. *Vester*, 281 U. S. 439, 446 (1930) ("It is well established that . . . the question [of] what is a public use is a judicial one").

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. See, *e. g.*, *Old Dominion*

Land Co. v. *United States*, 269 U. S. 55 (1925); *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 700 (1923). Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. See, *e. g.*, *National Railroad Passenger Corporation* v. *Boston & Maine Corp.*, 503 U. S. 407 (1992); *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30 (1916). But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, *e. g.*, *Berman* v. *Parker*, 348 U. S. 26 (1954); *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984).

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman*, we upheld takings within a blighted neighborhood of Washington, D. C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. 348 U. S., at 30. It had become burdened with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air." *Id.*, at 34. Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain. *Id.*, at 28 (internal quotation marks omitted). Mr. Berman's department store was not itself blighted. Having approved

of Congress' decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot. *Id.*, at 34–35; see also *Midkiff*, 467 U. S., at 244 ("[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny").

In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 232. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title. *Ibid.*

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts' "'deciding on what is and is not a governmental function and . . . invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.'" *Id.*, at 240–241 (quoting *United States ex rel. TVA* v. *Welch*, 327 U. S. 546, 552 (1946)); see *Berman*, *supra*, at 32 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"); see also *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528 (2005). Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature's ends. *Midkiff*, *supra*, at 242; *Berman*, *supra*, at 33.

Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U. S., at 245; *id.*, at 241 ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid' " (quoting *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 80 (1937))); see also *Missouri Pacific R. Co.* v. *Nebraska*, 164 U. S. 403, 417 (1896). To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . [though] the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff*, *supra*, at 240 (quoting *Berman*, *supra*, at 32).

The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. *Berman*, *supra*, at 28–29; *Midkiff*, *supra*, at 232. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church

that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U. S., at 32. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*, at 33. Following up, we said in *Midkiff* that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U. S., at 240. This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is

constitutional, the police power and "public use" cannot always be equated.

The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee—without detailing how courts are to conduct that complicated inquiry. *Ante*, at 477–478. For his part, JUSTICE KENNEDY suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take—without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. *Ante*, at 491–492 (concurring opinion). Whatever the details of JUSTICE KENNEDY's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1025–1026, n. 12 (1992). The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs. See App. to Pet. for Cert. 275–277.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same

from the constitutional perspective—private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade—not downgrade—property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. See *Lingle*, 544 U. S. 528. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. Cf. *Bugryn* v. *Bristol*, 63 Conn. App. 98, 774 A. 2d 1042 (2001) (taking the homes and farm of four owners in their 70's and 80's and giving it to an "industrial park"); *99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (CD Cal. 2001) (attempted taking of 99 Cents store to replace with a Costco); *Poletown Neighborhood Council* v. *Detroit*, 410 Mich. 616, 304 N. W. 2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by *County of Wayne* v. *Hathcock*, 471 Mich. 445, 684 N. W. 2d 765 (2004); Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 4–11 (describing takings of religious institutions' properties); Institute for Justice, D. Berliner, Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003) (collecting accounts of economic development takings).

The Court also puts special emphasis on facts peculiar to this case: The NLDC's plan is the product of a relatively careful deliberative process; it proposes to use eminent do-

main for a multipart, integrated plan rather than for isolated property transfer; it promises an array of incidental benefits (even esthetic ones), not just increased tax revenue; it comes on the heels of a legislative determination that New London is a depressed municipality. See, *e. g.*, *ante*, at 487 ("[A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case"). JUSTICE KENNEDY, too, takes great comfort in these facts. *Ante*, at 493 (concurring opinion). But none has legal significance to blunt the force of today's holding. If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in JUSTICE KENNEDY's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Finally, in a coda, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. *Ante*, at 489. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

* * *

It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory. In the prescient words of a dissenter from the infamous decision in *Poletown*, "[n]ow that we have authorized local legislative

bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." 410 Mich., at 644–645, 304 N. W. 2d, at 464 (opinion of Fitzgerald, J.). This is why economic development takings "seriously jeopardiz[e] the security of all private property ownership." *Id.*, at 645, 304 N. W. 2d, at 465 (Ryan, J., dissenting).

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*." For the National Gazette, Property (Mar. 27, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983).

I would hold that the takings in both Parcel 3 and Parcel 4A are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

JUSTICE THOMAS, dissenting.

Long ago, William Blackstone wrote that "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134–135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Amdt. 5.

Defying this understanding, the Court replaces the Public Use Clause with a "'[P]ublic [P]urpose'" Clause, *ante*, at 479–480 (or perhaps the "Diverse and Always Evolving Needs of Society" Clause, *ante*, at 479 (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational," *ante*, at 488 (internal quotation marks omitted). This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as JUSTICE O'CONNOR powerfully argues in dissent. *Ante*, at 494, 501–505. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

I

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any

> criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added.)

It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is "imperative that the Court maintain absolute fidelity to" the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally. *Shepard* v. *United States*, 544 U. S. 13, 28 (2005) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides "just compensation" for the taking, the Takings Clause also prohibits the government from taking property except "for public use." Were it otherwise, the Takings Clause would either be meaningless or empty. If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage. See *ante*, at 496 (O'CONNOR, J., dissenting); see also *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Myers* v. *United States*, 272 U. S. 52, 151 (1926). Alternatively, the Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." *Cole* v. *La Grange*, 113 U. S. 1, 8 (1885) (interpreting same language in the Missouri Public Use Clause). In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of compensa-

tion. This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827) (hereinafter Kent); For the National Gazette, Property (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds. 1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner").[1] The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain.

The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter Johnson). The term "use," moreover, "is from the Latin *utor*, which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc." J. Lewis, Law of Eminent Domain § 165, p. 224, n. 4 (1888) (hereinafter Lewis). When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actu-

[1] Some state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1056–1057 (1992) (Blackmun, J., dissenting). The Framers of the Fifth Amendment apparently disagreed, for they expressly prohibited uncompensated takings, and the Fifth Amendment was not incorporated against the States until much later. See *id.*, at 1028, n. 15.

ally "employ" the taken property. See *id.*, at 223 (reviewing founding-era dictionaries).

Granted, another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." 2 Johnson 2194. Nevertheless, read in context, the term "public use" possesses the narrower meaning. Elsewhere, the Constitution twice employs the word "use," both times in its narrower sense. Claeys, Public-Use Limitations and Natural Property Rights, 2004 Mich. St. L. Rev. 877, 897 (hereinafter Public Use Limitations). Article I, § 10, provides that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States," meaning the Treasury itself will control the taxes, not use it to any beneficial end. And Article I, § 8, grants Congress power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Here again, "use" means "employed to raise and support Armies," not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See *ibid.* ("Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, Classical Republicanism and the Fifth Amendment's "Public Use" Requirement, 49 Duke L. J. 339, 367–368 (1999) (hereinafter Sales) (noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other,

the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with compensation) with 3 *id.*, at 216 (noting action to remedy "*public* . . . nuisances, which affect the public, and are an annoyance to *all* the king's subjects"); see also 2 Kent 274–276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great . . . is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. He continued: "If a new road . . . were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." *Ibid.* Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." *Ibid.* When the public took property, in other words, it took it as an individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] *property* from A. and

giv[ing] it to B." *Calder* v. *Bull*, 3 Dall. 386, 388 (1798); see also *Wilkinson* v. *Leland*, 2 Pet. 627, 658 (1829); *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 311 (CC Pa. 1795).

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See *Kohl* v. *United States*, 91 U. S. 367, 371–372 (1876) (noting Federal Government's power under the Necessary and Proper Clause to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise of Congress' enumerated powers, *Sabri* v. *United States*, 541 U. S. 600, 613 (2004) (THOMAS, J., concurring in judgment), and it must not "subvert basic principles of" constitutional design, *Gonzales* v. *Raich*, *ante*, at 65 (THOMAS, J., dissenting). In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. See *supra*, at 507. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.

II

Early American eminent domain practice largely bears out this understanding of the Public Use Clause. This practice

concerns state limits on eminent domain power, not the Fifth Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the Takings Clause did not even arguably limit state power until after the passage of the Fourteenth Amendment. See Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L. J. 599, 599–600, and nn. 3–4 (1949); *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 250–251 (1833) (holding the Takings Clause inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." See Sales 367–369, and n. 137 (emphasis deleted). Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Lewis §§ 166, 168–171, 175, at 227–228, 234–241, 243. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. See, *e. g.*, *id.*, § 178, at 245–246; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 16–19, and n. (1885). Those early grist mills "were regulated by law and compelled to serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. Lewis § 178, at 246, and n. 3; see also *Head*, *supra*, at 18–19. They were common carriers—quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally. See Public Use Limitations 903 (common-carrier status traditionally afforded to "private beneficiaries of a state fran-

chise or another form of state monopoly, or to companies that operated in conditions of natural monopoly").

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. See Lewis § 167, at 230. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. See *id.*, § 167, at 230–234. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-carrier duties. See, *e. g.*, M. Horwitz, The Transformation of American Law 1780–1860, pp. 51–52 (1977).

These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the Public Use Clause, see, *e. g.*, *ante*, at 479–480, n. 8 (majority opinion); Brief for Respondents 30; Brief for American Planning Assn. et al. as *Amici Curiae* 6–7, but in fact the constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use."[2] As noted above,

---

[2] Compare *ante*, at 479, and n. 8 (majority opinion) (noting that some state courts upheld the validity of applying the Mill Acts to private purposes and arguing that the "'use by the public' test" "eroded over time"), with, *e. g.*, *Ryerson* v. *Brown*, 35 Mich. 333, 338–339 (1877) (holding it "essential" to the constitutionality of a Mill Act "that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations"); *Gaylord* v. *Sanitary Dist. of Chicago*, 204 Ill. 576, 581–584, 68 N. E. 522, 524 (1903) (same); *Tyler* v. *Beacher*, 44 Vt. 648, 652–656 (1871) (same); *Sadler* v. *Langham*, 34 Ala. 311, 332–334 (1859) (striking down taking for purely private road and grist mill); *Varner* v. *Martin*, 21 W. Va. 534, 546–548, 556–557, 566–567 (1883) (grist mill and private road had to be open to public for them to

the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that subsequent practice is consistent with the original meaning of the Public Use Clause. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 370 (1995) (THOMAS, J., concurring in judgment). At the time of the founding, "[b]usiness corporations were only beginning to upset the old corporate model, in which the raison d'être of chartered associations was their service to the public," Horwitz, *supra*, at 49–50, so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

III

Our current Public Use Clause jurisprudence, as the Court notes, has rejected this natural reading of the Clause. *Ante*, at 479–483. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential

---

constitute public use); *Harding* v. *Goodlett*, 3 Yer. 41, 53 (Tenn. 1832); *Jacobs* v. *Clearview Water Supply Co.*, 220 Pa. 388, 393–395, 69 A. 870, 872 (1908) (endorsing actual public use standard); *Minnesota Canal & Power Co.* v. *Koochiching Co.*, 97 Minn. 429, 449–451, 107 N. W. 405, 413 (1906) (same); *Chesapeake Stone Co.* v. *Moreland*, 126 Ky. 656, 663–667, 104 S. W. 762, 765 (Ct. App. 1907) (same); Note, Public Use in Eminent Domain, 21 N. Y. U. L. Q. Rev. 285, 286, and n. 11 (1946) (calling the actual public use standard the "majority view" and citing other cases).

conception of "public use" adopted by this Court in *Berman* v. *Parker*, 348 U. S. 26 (1954), and *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), cases that take center stage in the Court's opinion. See *ante*, at 480–482. The weakness of those two lines of cases, and consequently *Berman* and *Midkiff*, fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

A

As the Court notes, the "public purpose" interpretation of the Public Use Clause stems from *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 161–162 (1896). *Ante*, at 479–480. The issue in *Bradley* was whether a condemnation for purposes of constructing an irrigation ditch was for a public use. 164 U. S., at 161. This was a public use, Justice Peckham declared for the Court, because "[t]o irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." *Ibid.* That broad statement was dictum, for the law under review also provided that "[a]ll landowners in the district have the right to a proportionate share of the water." *Id.*, at 162. Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public—those who owned lands irrigated by the ditch—had a right to use it. The Court cited no authority for its dictum, and did not discuss either the Public Use Clause's original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts, see *id.*, at 158; *supra*, at 513–514, and n. 2). Instead, the Court reasoned that "[t]he use must be regarded as a public use, or else it would seem to follow that no gen-

eral scheme of irrigation can be formed or carried into effect." *Bradley, supra,* at 160–161. This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," *ante,* at 479, the Constitution does not embody those policy preferences any more than it "enact[s] Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York,* 198 U. S. 45, 75 (1905) (Holmes, J., dissenting); but see *id.,* at 58–62 (Peckham, J., for the Court).

This Court's cases followed *Bradley*'s test with little analysis. In *Clark* v. *Nash,* 198 U. S. 361 (1905) (Peckham, J., for the Court), this Court relied on little more than a citation to *Bradley* in upholding another condemnation for the purpose of laying an irrigation ditch. 198 U. S., at 369–370. As in *Bradley,* use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "[o]ther land owners adjoining the defendant in error . . . might share," 198 U. S., at 370, and therefore *Clark* also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527 (1906), the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than *Clark,* see *Strickley, supra,* at 531. This case, too, could have been disposed of on the narrower ground that "the plaintiff [was] a carrier for itself and others," 200 U. S., at 531–532, and therefore that the bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." *Id.,* at 531. This Court's cases quickly incorporated the public purpose standard set forth in *Clark* and *Strickley* by barren citation. See,

e. g., *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 700, 707 (1923); *Block* v. *Hirsh*, 256 U. S. 135, 155 (1921); *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32 (1916); *O'Neill* v. *Leamer*, 239 U. S. 244, 253 (1915).

B

A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. *Id.*, at 679–680. Since the Federal Government was to use the lands in question, *id.*, at 682, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.*, at 680. As it had with the "public purpose" dictum in *Bradley*, the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, *e. g.*, *United States ex rel. TVA* v. *Welch*, 327 U. S. 546, 552 (1946); *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66 (1925).

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely

among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, see, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see *Deck* v. *Missouri*, 544 U. S. 622 (2005), or when state law creates a property interest protected by the Due Process Clause, see, *e. g.*, *Castle Rock* v. *Gonzales*, *post*, at 756–758; *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 576 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 262–263 (1970).

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, *e. g.*, *Goldberg*, *supra*, while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton*, *supra*, at 601, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," *ante*, at 488, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, *ante*, at 477, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

C

These two misguided lines of precedent converged in *Berman* v. *Parker*, 348 U. S. 26 (1954), and *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984). Relying on those lines of cases, the Court in *Berman* and *Midkiff* upheld condemnations for the purposes of slum clearance and land redistribution, respectively. "Subject to specific constitutional limitations," *Berman* proclaimed, "when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." 348 U. S., at 32. That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the Public Use Clause prevented the taking of the appellant's (concededly "nonblighted") department store. *Id.*, at 31, 34. *Berman* also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was *per se* a "public use" under the Fifth Amendment. *Id.*, at 33. But the very point of the Public Use Clause is to limit that power. See *supra*, at 508.

More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. See *Midkiff*, *supra*, at 240 ("The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers"); *Berman*, *supra*, at 32. Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, see *Mugler* v. *Kansas*, 123 U. S. 623, 668–669 (1887), in sharp contrast to the takings power, which has always required compensation, see *supra*, at 508, and n. 1. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. See, *e. g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992); *Mugler*,

supra, at 668–669. In *Berman*, for example, if the slums at issue were truly "blighted," then state nuisance law, see, *e. g.*, *supra*, at 510; *Lucas*, *supra*, at 1029, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use Clause to overlap with the States' police power conflates these two categories.[3]

The "public purpose" test applied by *Berman* and *Midkiff* also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience . . . we are afloat without any certain principle to guide us." *Bloodgood* v. *Mohawk & Hudson R. Co.*, 18 Wend. 9, 60–61 (NY 1837) (opinion of Tracy, Sen.). Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use—at least, none beyond JUSTICE O'CONNOR's (entirely proper) appeal to the text of the Constitution itself. See *ante*, at 494, 501–505 (dissenting opinion). I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. *Ante*, at 486–489. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking.

---

[3] Some States also promoted the alienability of property by abolishing the feudal "quit rent" system, *i. e.*, long-term leases under which the proprietor reserved to himself the right to perpetual payment of rents from his tenant. See Vance, The Quest for Tenure in the United States, 33 Yale L. J. 248, 256–257, 260–263 (1923). In *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), the Court cited those state policies favoring the alienability of land as evidence that the government's eminent domain power was similarly expansive, see *id.*, at 241–242, and n. 5. But they were uses of the States' regulatory power, not the takings power, and therefore were irrelevant to the issue in *Midkiff*. This mismatch underscores the error of conflating a State's regulatory power with its takings power.

Ante, at 477–478. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. Cf. *ante*, at 502–503 (O'CONNOR, J., dissenting) (noting the complicated inquiry the Court's test requires). The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." *Ante*, at 479. It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"—unless the Court means to eliminate public use scrutiny of takings entirely. *Ante*, at 477–478, 488–489. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

IV

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," *United States* v. *Carolene Products Co.*, 304 U. S.

144, 152, n. 4 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms," to victimize the weak. *Ante*, at 505 (O'CONNOR, J., dissenting).

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman*, cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, Downtown, Inc. How America Rebuilds Cities 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." *Id.*, at 28. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.*, at 28–29. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. 348 U. S., at 30. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

* * *

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. See *ante*, at 479–483. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws, see *supra*, at 515–516. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in JUSTICE O'CONNOR's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

Syllabus

GONZALEZ *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04–6432. Argued April 25, 2005—Decided June 23, 2005

Petitioner's federal habeas corpus petition was dismissed as time barred when the District Court concluded that the federal limitations period was not tolled while petitioner's motion for postconviction relief was pending in state court. After petitioner abandoned his attempt to seek review of the District Court's decision, this Court decided that a state postconviction relief petition can toll the federal statute of limitations even if, like petitioner's, the petition is ultimately dismissed as procedurally barred. *Artuz* v. *Bennett*, 531 U. S. 4. Petitioner filed a Federal Rule of Civil Procedure 60(b)(6) motion for relief from the judgment, which the District Court denied. The Eleventh Circuit affirmed the denial, holding that the Rule 60(b) motion was in substance a second or successive habeas petition, which under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(b), cannot be filed without precertification by the court of appeals.

Held:

1. Because petitioner's Rule 60(b) motion challenged only the District Court's previous ruling on AEDPA's statute of limitations, it is not the equivalent of a successive habeas petition and can be ruled upon by the District Court without precertification by the Eleventh Circuit. Pp. 528–536.

(a) Rule 60(b) applies in §2254 habeas proceedings only "to the extent that [it is] not inconsistent with" applicable federal statutes and rules. §2254 Rule 11. Because §2244(b) applies only where a court acts pursuant to a prisoner's "habeas corpus application," the question here is whether a Rule 60(b) motion is such an application. The text of §2244(b) shows that, for these purposes, a habeas application is a filing containing one or more "claims." Other federal habeas statutes and this Court's decisions also make clear that a "claim" is an asserted federal basis for relief from a state-court conviction. If a Rule 60(b) motion contains one or more "claims," the motion is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to AEDPA's restrictions on successive habeas petitions would be "inconsistent with" the statute. A Rule 60(b) motion can be said to bring a "claim" if it seeks to add a new ground for relief from the state conviction or attacks the federal court's previous resolution of a claim

Syllabus

on the merits, though not if it merely attacks a defect in the federal habeas proceedings' integrity. Pp. 528–532.

(b) When no "claim" is presented, there is no basis for contending that a Rule 60(b) motion should be treated like a habeas petition. If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed on its own terms creates no inconsistency with the habeas statute or rules. Petitioner's motion, which alleges that the federal courts misapplied § 2244(d)'s statute of limitations, fits this description. Nothing in *Calderon* v. *Thompson*, 523 U. S. 538, suggests that entertaining a filing confined to a *nonmerits* aspect of the first federal habeas proceeding is "inconsistent with" AEDPA. Pp. 533–536.

2. Under the proper Rule 60(b) standards, the District Court was correct to deny relief. The change in the law worked by *Artuz* is not an "extraordinary circumstance" justifying relief under Rule 60(b)(6), and it is made all the less extraordinary by the lack of diligence that petitioner showed in seeking direct appellate review of the statute-of-limitations issue. Pp. 536–538.

366 F. 3d 1253, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 538. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 539.

Paul M. Rashkind argued the cause for petitioner. With him on the briefs was *Richard C. Klugh*.

Christopher M. Kise, Solicitor General of Florida, argued the cause for respondent. With him on the brief were *Charles J. Crist, Jr.*, Attorney General, *Carolyn Snurkowski*, Assistant Deputy Attorney General, and *Cassandra Dolgin*, Assistant Attorney General.

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben*.*

---

*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers by *Joshua L. Dratel* and *David Oscar Markus*; for the Office of the Federal Public Defender for the Middle District of Tennessee by *Paul R. Bottei*; and for Abu-Ali Abdur'Rahman

JUSTICE SCALIA delivered the opinion of the Court.

After the federal courts denied petitioner habeas corpus relief from his state conviction, he filed a motion for relief from that judgment, pursuant to Federal Rule of Civil Procedure 60(b). The question presented is whether, in a habeas case, such motions are subject to the additional restrictions that apply to "second or successive" habeas corpus petitions under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at 28 U. S. C. § 2244(b).

I

Petitioner Aurelio Gonzalez pleaded guilty in Florida Circuit Court to one count of robbery with a firearm. He filed no appeal and began serving his 99-year sentence in 1982. Some 12 years later, petitioner began to seek relief from his conviction. He filed two motions for state postconviction relief, which the Florida courts denied. Thereafter, in June 1997, petitioner filed a federal habeas petition in the United States District Court for the Southern District of Florida,

---

by *Thomas C. Goldstein, Amy Howe, William P. Redick, Jr., Pamela S. Karlan,* and *Bradley A. MacLean.*

Briefs of *amici curiae* urging affirmance were filed for the State of Tennessee et al. by *Paul G. Summers,* Attorney General of Tennessee, *Michael E. Moore,* Solicitor General, *Joseph F. Whalen,* Associate Solicitor General, and *Christopher L. Morano,* Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Gregory D. Stumbo* of Kentucky, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Judith Williams Jagdmann* of Virginia, and *Patrick J. Crank* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

alleging that his guilty plea had not been entered knowingly and voluntarily.

Upon the State's motion, the District Court dismissed petitioner's habeas petition as barred by AEDPA's statute of limitations, 28 U. S. C. § 2244(d). Under Eleventh Circuit precedent, petitioner's filing deadline, absent tolling, was April 23, 1997, one year after AEDPA's statute of limitations took effect. *Wilcox* v. *Florida Dept. of Corrections*, 158 F. 3d 1209, 1211 (CA11 1998) *(per curiam)*. Adopting a Magistrate Judge's recommendation, the District Court concluded that the limitations period was not tolled during the 163-day period while petitioner's second motion for state postconviction relief was pending. Section 2244(d)(2) tolls the statute of limitations during the pendency of "properly filed" applications only, and the District Court thought petitioner's motion was not "properly filed" because it was both untimely and successive. Without tolling, petitioner's federal habeas petition was two months late, so the District Court dismissed it as time barred. A judge of the Eleventh Circuit denied a certificate of appealability (COA) on April 6, 2000, and petitioner did not file for rehearing or review of that decision.

On November 7, 2000, we held in *Artuz* v. *Bennett*, 531 U. S. 4, that an application for state postconviction relief can be "properly filed" even if the state courts dismiss it as procedurally barred. See *id.*, at 8–9. Almost nine months later, petitioner filed in the District Court a *pro se* "Motion to Amend or Alter Judgment," contending that the District Court's time-bar ruling was incorrect under *Artuz*'s construction of § 2244(d), and invoking Federal Rule of Civil Procedure 60(b)(6), which permits a court to relieve a party from the effect of a final judgment.[1] The District Court denied the motion, and petitioner appealed.

---

[1] Although the title "Motion to Alter or Amend Judgment" suggests that petitioner was relying on Federal Rule of Civil Procedure 59(e), the substance of the motion made clear that petitioner sought relief under Rule 60(b)(6).

A judge of the Court of Appeals for the Eleventh Circuit granted petitioner a COA, but a panel quashed the certificate as improvidently granted. 317 F. 3d 1308, 1310, 1314 (2003). The full court vacated that order and reheard the case en banc. It granted petitioner a COA but held, by a vote of 7 to 4, that the District Court was correct to deny his Rule 60(b) motion. The en banc majority determined that petitioner's motion—indeed, any postjudgment motion under Rule 60(b) save one alleging fraud on the court under Rule 60(b)(3)—was in substance a second or successive habeas corpus petition. 366 F. 3d 1253, 1278, 1281–1282 (2004). A state prisoner may not file such a petition without precertification by the court of appeals that the petition meets certain stringent criteria. § 2244(b). Because petitioner's motion did not satisfy these requirements, the Eleventh Circuit affirmed its denial. *Id.*, at 1282.

We granted certiorari. 543 U. S. 1086 (2005).

II

Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.[2] Rule 60(b)(6), the particular provision

---

[2] Rule 60(b) provides in relevant part:

"On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

under which petitioner brought his motion, permits reopening when the movant shows "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)–(5). See *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 863, n. 11 (1988); *Klapprott* v. *United States*, 335 U. S. 601, 613 (1949) (opinion of Black, J.). The mere recitation of these provisions shows why we give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality. The issue here is whether the text of Rule 60(b) itself, or of some other provision of law, limits its application in a manner relevant to the case before us.

AEDPA did not expressly circumscribe the operation of Rule 60(b). (By contrast, AEDPA directly amended other provisions of the Federal Rules. See, *e. g.*, AEDPA, § 103, 110 Stat. 1218 (amending Fed. Rule App. Proc. 22).) The new habeas restrictions introduced by AEDPA are made indirectly relevant, however, by the fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U. S. C. § 2254[3] only "to the extent that [it is] not inconsistent with" applicable federal statutory provisions and rules. 28 U. S. C. § 2254 Rule 11; see Fed. Rule Civ. Proc. 81(a)(2). The relevant provisions of the AEDPA-amended habeas statutes, 28 U. S. C. §§ 2244(b)(1)–(3), impose three requirements on second or successive habeas petitions: First, any claim that has already

[3] In this case we consider only the extent to which Rule 60(b) applies to habeas proceedings under 28 U. S. C. § 2254, which governs federal habeas relief for prisoners convicted in state court. Federal prisoners generally seek postconviction relief under § 2255, which contains its own provision governing second or successive applications. Although that portion of § 2255 is similar to, and refers to, the statutory subsection applicable to second or successive § 2254 petitions, it is not identical. Accordingly, we limit our consideration to § 2254 cases.

been adjudicated in a previous petition must be dismissed. § 2244(b)(1). Second, any claim that has *not* already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. § 2244(b)(2). Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions. § 2244(b)(3). We proceed to consider whether these provisions limit the application of Rule 60(b) to the present case.

A

"As a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's 'application'" for a writ of habeas corpus. *Calderon* v. *Thompson*, 523 U. S. 538, 554 (1998). We therefore must decide whether a Rule 60(b) motion filed by a habeas petitioner is a "habeas corpus application" as the statute uses that term.

Under § 2244(b), the first step of analysis is to determine whether a "claim presented in a second or successive habeas corpus application" was also "presented in a prior application." If so, the claim must be dismissed; if not, the analysis proceeds to whether the claim satisfies one of two narrow exceptions. In either event, it is clear that for purposes of § 2244(b) an "application" for habeas relief is a filing that contains one or more "claims." That definition is consistent with the use of the term "application" in the other habeas statutes in chapter 153 of title 28. See, *e. g.*, *Woodford* v. *Garceau*, 538 U. S. 202, 207 (2003) (for purposes of § 2254(d), an application for habeas corpus relief is a filing that seeks "an adjudication on the *merits* of the petitioner's claims"). These statutes, and our own decisions, make clear that a "claim" as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction.

In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly

assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. Cf. *Harris* v. *United States*, 367 F. 3d 74, 80–81 (CA2 2004) (petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. *E. g.*, *Rodwell* v. *Pepe*, 324 F. 3d 66, 69 (CA1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. *E. g.*, *Dunlap* v. *Litscher*, 301 F. 3d 873, 876 (CA7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly. *E. g.*, *Rodwell*, *supra*, at 71–72; *Dunlap*, *supra*, at 876.

We think those holdings are correct. A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute. 28 U. S. C. § 2254 Rule 11. Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. § 2244(b)(2). The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated: Even assuming that reliance on a new factual predicate causes that motion to escape § 2244(b)(1)'s prohibition of claims "presented in a prior application," § 2244(b)(2)(B) requires a more convincing factual showing than does Rule 60(b). Likewise, a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent § 2244(b)(2)(A)'s

dictate that the only new law on which a successive petition may rely is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In addition to the substantive conflict with AEDPA standards, in each of these three examples use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar. § 2244(b)(3).

In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief, as in *Harris*, *supra*, will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits*,[4] since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.[5]

---

[4] The term "on the merits" has multiple usages. See, *e. g.*, *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 501–503 (2001). We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U. S. C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.

[5] Fraud on the federal habeas court is one example of such a defect. See generally *Rodriguez* v. *Mitchell*, 252 F. 3d 191, 199 (CA2 2001) (a witness's allegedly fraudulent basis for refusing to appear at a federal habeas hearing "relate[d] to the integrity of the federal habeas proceeding, not to the integrity of the state criminal trial"). We note that an attack based on the movant's own conduct, or his habeas counsel's omissions, see,

B

When no "claim" is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application. If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules. Petitioner's motion in the present case, which alleges that the federal courts misapplied the federal statute of limitations set out in § 2244(d), fits this description.[6]

Like the Court of Appeals, respondent relies heavily on our decision in *Calderon* v. *Thompson*, 523 U. S. 538 (1998). In that case we reversed the Ninth Circuit's decision to recall its mandate and reconsider the denial of Thompson's first federal habeas petition; the recall was, we held, an abuse of discretion because of its inconsistency with the policies embodied in AEDPA. *Id.*, at 554–559. Analogizing an appellate court's recall of its mandate to a district court's grant of relief from judgment, the Eleventh Circuit thought that *Calderon*'s disposition applied to Rule 60(b). 366 F. 3d, at 1272–1277. We think otherwise. To begin with, as the opinion said, compliance with the actual text of AEDPA's

---

e. g., *supra*, at 530–531, ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.

[6] Petitioner notes that we held in *Slack* v. *McDaniel*, 529 U. S. 473 (2000), that when a petition is dismissed without prejudice as unexhausted, the refiled petition is not "successive." He argues that, by parity of reasoning, his Rule 60(b) motion challenging the District Court dismissal of his petition on statute-of-limitations grounds is not "successive." If this argument is correct, petitioner would be able to file not just a Rule 60(b) motion, but a full-blown habeas petition, without running afoul of § 2244(b). But see, *e. g.*, *Murray* v. *Greiner*, 394 F. 3d 78, 81 (CA2 2005). We need not consider this contention, however, because we conclude that petitioner's Rule 60(b) motion is not subject to the limitations applicable to habeas petitions.

successive-petition provision was not at issue in *Calderon*—because the Court of Appeals considered only the claims and evidence presented in Thompson's first federal habeas petition. 523 U. S., at 554. *Calderon* did state, however, that "a prisoner's motion to recall the mandate *on the basis of the merits* of the underlying decision can be regarded as a second or successive application." *Id.*, at 553 (emphasis added). But that is entirely consonant with the proposition that a Rule 60(b) motion that seeks to revisit the federal court's denial *on the merits* of a claim for relief should be treated as a successive habeas petition. The problem for respondent is that this case does not present a revisitation *of the merits*. The motion here, like some other Rule 60(b) motions in § 2254 cases, confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding. Nothing in *Calderon* suggests that entertaining such a filing is "inconsistent with" AEDPA.

Rule 60(b) has an unquestionably valid role to play in habeas cases. The Rule is often used to relieve parties from the effect of a default judgment mistakenly entered against them, *e. g.*, *Klapprott*, 335 U. S., at 615 (opinion of Black, J.), a function as legitimate in habeas cases as in run-of-the-mine civil cases. The Rule also preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction—a consideration just as valid in habeas cases as in any other, since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties. *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94, 101 (1998). In some instances, we may note, it is the State, not the habeas petitioner, that seeks to use Rule 60(b), to reopen a habeas judgment *granting* the writ. See, *e. g.*, *Ritter* v. *Smith*, 811 F. 2d 1398, 1400 (CA11 1987).

Moreover, several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA, ensuring that our harmonization of the two will not expose federal courts to an ava-

lanche of frivolous postjudgment motions. First, Rule 60(b) contains its own limitations, such as the requirement that the motion "be made within a reasonable time" and the more specific 1-year deadline for asserting three of the most open-ended grounds of relief (excusable neglect, newly discovered evidence, and fraud). Second, our cases have required a movant seeking relief under Rule 60(b)(6) to show "extraordinary circumstances" justifying the reopening of a final judgment. *Ackermann* v. *United States*, 340 U. S. 193, 199 (1950); accord, *id.*, at 202; *Liljeberg*, 486 U. S., at 864; *id.*, at 873 (REHNQUIST, C. J., dissenting) ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved"). Such circumstances will rarely occur in the habeas context. Third, Rule 60(b) proceedings are subject to only limited and deferential appellate review. *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 263, n. 7 (1978). Many Courts of Appeals have construed 28 U. S. C. § 2253 to impose an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion.[7]

Because petitioner's Rule 60(b) motion challenges only the District Court's previous ruling on the AEDPA statute of limitations, it is not the equivalent of a successive habeas

---

[7] See *Reid* v. *Angelone*, 369 F. 3d 363, 369, n. 2 (CA4 2004) (citing cases); 366 F. 3d 1253, 1263 (CA11 2004) (case below); cf. *Langford* v. *Day*, 134 F. 3d 1381, 1382 (CA9 1998) (before AEDPA, a certificate of probable cause was a prerequisite to appealing the denial of a Rule 60(b) motion in a habeas case); *Reid*, *supra*, at 368 (same). But see *Dunn* v. *Cockrell*, 302 F. 3d 491, 492 (CA5 2002); 366 F. 3d, at 1298–1300 (Tjoflat, J., specially concurring in part and dissenting in part). Although we do not decide in this case whether this construction of § 2253 is correct (the Eleventh Circuit granted petitioner a COA), the COA requirement appears to be a more plausible and effective screening requirement, with sounder basis in the statute, than the near-absolute bar imposed here by the Court of Appeals.

petition. The Eleventh Circuit therefore erred in holding that petitioner did not qualify even to seek Rule 60(b) relief.

III

Although the Eleventh Circuit's reasoning is inconsistent with our holding today, we nonetheless affirm its denial of petitioner's Rule 60(b) motion.

Petitioner's only ground for reopening the judgment denying his first federal habeas petition is that our decision in *Artuz* showed the error of the District Court's statute-of-limitations ruling. We assume for present purposes that the District Court's ruling was incorrect.[8] As we noted above, however, relief under Rule 60(b)(6)—the only subsection petitioner invokes—requires a showing of "extraordinary circumstances." Petitioner contends that *Artuz*'s change in the interpretation of the AEDPA statute of limitations meets this description. We do not agree. The District Court's interpretation was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation of 28 U. S. C. § 2244(d)(2). It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation. Although our constructions of federal statutes customarily apply to all cases then pending on direct review, see, *e. g.*, *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 97 (1993), not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final.[9] If *Artuz* justified reopening long-ago dis-

---

[8] Although respondent contends that petitioner's motion for state post-conviction relief was untimely, and that the District Court's denial of statutory tolling was therefore correct under *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), the Florida courts made no reference to untimeliness in dismissing petitioner's motion.

[9] A change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment, particularly in the criminal context. See *Bousley* v. *United States*, 523 U. S. 614, 619–621 (1998); cf. *Fiore* v. *White*, 531 U. S. 225, 228–229 (2001) *(per curiam)*.

missals based on a lower court's unduly parsimonious interpretation of § 2244(d)(2), then *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), would justify reopening long-ago grants of habeas relief based on a lower court's unduly *generous* interpretation of the same tolling provision.

The change in the law worked by *Artuz* is all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review of the statute-of-limitations issue. At the time *Artuz* was decided, petitioner had abandoned any attempt to seek review of the District Court's decision on this statute-of-limitations issue. Although the District Court relied on Eleventh Circuit precedent holding that a state postconviction application is not "properly filed" if it is procedurally defaulted, and although that precedent was at odds with the rule in several other Circuits, petitioner neither raised that issue in his application for a COA, nor filed a petition for rehearing of the Eleventh Circuit's denial of a COA, nor sought certiorari review of that denial.[10] This lack of diligence confirms that *Artuz* is not an extraordinary circumstance justifying relief from the judgment in petitioner's case. Indeed, in one of the cases in which we explained Rule 60(b)(6)'s extraordinary-circumstances requirement, the movant had failed to appeal an adverse ruling by the District Court, whereas another party to the same judgment had

---

[10] We granted review to resolve the conflict over the interpretation of "properly filed" on April 17, 2000, only eight days after the Eleventh Circuit denied petitioner a COA and well within the 90-day period in which petitioner could have sought certiorari. *Artuz* v. *Bennett*, 529 U. S. 1065. Whether or not petitioner was aware that the issue was pending before us, see *post*, at 544–545, n. 7 (STEVENS, J., dissenting), it is indisputable that had he but filed a petition raising the statute-of-limitations argument he now advances, we would surely have granted him the reconsideration in light of *Artuz* v. *Bennett*, 531 U. S. 4 (2000), that he later sought in his Rule 60(b) motion. See, *e. g.*, *Brown* v. *Moore*, 532 U. S. 968 (2001) (granting a *pro se* petition for certiorari, vacating the Eleventh Circuit's judgment denying a COA, and remanding for reconsideration in light of *Artuz*, 531 U. S. 4).

appealed and won reversal. *Ackermann*, 340 U. S., at 195. Some years later, the petitioner sought Rule 60(b) relief, which the District Court denied. We affirmed the denial of Rule 60(b) relief, noting that the movant's decision not to appeal had been free and voluntary, although the favorable ruling in the companion case made it appear mistaken in hindsight. See *id.*, at 198.

Under the Rule 60(b) standards that properly govern petitioner's motion, the District Court was correct to deny relief.

* * *

We hold that a Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. A motion that, like petitioner's, challenges only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244(b)(3). In this case, however, petitioner's Rule 60(b)(6) motion fails to set forth an "extraordinary circumstance" justifying relief. For that reason, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE BREYER, concurring.

The majority explains that a proper Federal Rule of Civil Procedure 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Ante*, at 532. This is consistent with Judge Tjoflat's description of the standard in his opinion below, see 366 F. 3d 1253, 1297 (CA11 2004) (specially concurring in part and dissenting in part), and I agree with it. I fear that other language in the majority's opinion, especially its discussion of the significance of the word "claim," could be taken to imply a different

standard, with which I would disagree. With that qualification, I join the majority's opinion.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

The most significant aspect of today's decision is the Court's unanimous rejection of the view that all postjudgment motions under Federal Rule of Civil Procedure 60(b) except those alleging fraud under Rule 60(b)(3) should be treated as second or successive habeas corpus petitions. Not only do I agree with that holding, I believe that we should have more promptly made clear that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Rule 60(b) can coexist in harmony. See *Abdur'Rahman* v. *Bell*, 537 U. S. 88, 90 (2002) (STEVENS, J., dissenting from dismissal of certiorari as improvidently granted).

As the Court recognizes, whether a Rule 60(b) motion may proceed in the habeas context depends on the nature of the relief the motion seeks. See *ante*, at 533.[1] Given the substance of petitioner's motion, I agree with the Court that this was a "true" Rule 60(b) motion and that the District Court and the Court of Appeals therefore erred in treating it as a successive habeas petition. And while I also agree with much of the Court's reasoning in Parts I and II of its opinion, I believe the Court goes too far in commenting on

---

[1] Under the First Circuit's useful formulation, which was invoked by Judge Tjoflat's dissenting opinion below, "[w]hen the motion's factual predicate deals primarily with the constitutionality of the underlying state conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying relief. That is the classic function of a Rule 60(b) motion, and such a motion should be treated within the usual confines of Rule 60(b)." *Rodwell* v. *Pepe*, 324 F. 3d 66, 70 (2003) (citation omitted); see also 366 F. 3d 1253, 1297 (CA11 2004) (Tjoflat, J., specially concurring in part and dissenting in part).

issues that are not directly before us and that have not been fully briefed. See, *e. g.*, *ante*, at 530–532 (discussing various Court of Appeals cases). My main disagreement, however, pertains to Part III of the Court's opinion.

The Court reaches beyond the question on which we granted certiorari (whether petitioner's Rule 60(b) motion should be treated as a successive habeas petition) and adjudicates the merits of that motion. In my judgment, however, "correct procedure requires that the merits of the Rule 60(b) motion be addressed in the first instance by the District Court." *Abdur'Rahman*, 537 U. S., at 97 (STEVENS, J., dissenting). A district court considering a Rule 60(b) motion will often take into account a variety of factors in addition to the specific ground given for reopening the judgment. These factors include the diligence of the movant, the probable merit of the movant's underlying claims, the opposing party's reliance interests in the finality of the judgment, and other equitable considerations. See 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2857 (2d ed. 1995 and Supp. 2004); see *ibid.* (noting that appellate courts will reverse a district court's decision only for an abuse of discretion); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 233–234 (1995) (Rule 60(b) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity"). In light of the equitable, often fact-intensive nature of the Rule 60(b) inquiry, it is inappropriate for an appellate court to undertake it in the first instance. This is especially so in this case, in which both the briefing and the record before us are insufficient with regard to the merits issue.

Orderly procedure aside, the Court's truncated analysis is unsatisfactory. At least in some circumstances, a supervening change in AEDPA procedural law can be the kind of "extraordinary circumstanc[e]," *Ackermann* v. *United States*,

340 U. S. 193, 199 (1950), that constitutes a "reason justifying relief from the operation of the judgment" within the meaning of Rule 60(b)(6). In this case, the District Court dismissed petitioner's habeas petition as time barred after concluding that his second motion for state postconviction relief did not toll AEDPA's statute of limitations. See 28 U. S. C. § 2244(d). After that judgment became final, however, we decided *Artuz* v. *Bennett*, 531 U. S. 4 (2000), which made clear that the District Court's ruling on tolling was erroneous and that the habeas petition should therefore not have been dismissed.[2]

Unfortunately, the Court underestimates the significance of the fact that petitioner was effectively shut out of federal court—without any adjudication of the merits of his claims—because of a procedural ruling that was later shown to be flatly mistaken. As we have stressed, "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 517 U. S. 314, 324 (1996); see also *Slack* v. *McDaniel*, 529 U. S. 473, 483 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights"). When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived—contrary to congressional intent—of his valuable right to one full round of federal habeas review.

While this type of supervening change in procedural law may not alone warrant the reopening of a habeas judgment, there may be special factors that allow a prisoner to satisfy

---

[2] Although the State contests this point in a footnote, see Brief for Respondent 40–41, n. 33, the Court rightly assumes that the District Court's decision was incorrect. See *ante*, at 536, and n. 8. If any doubt remains, it should be resolved by the District Court in the first instance.

the high standard of Rule 60(b)(6). For instance, when a prisoner has shown reasonable diligence in seeking relief based on a change in procedural law, and when that prisoner can show that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under Rule 60(b)(6) for that court to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress intended that he have. After all, we have consistently recognized that Rule 60(b)(6) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 864 (1988) (quoting *Klapprott* v. *United States*, 335 U. S. 601, 614–615 (1949)). Here, petitioner, who is serving a 99-year term in Florida prison, filed his Rule 60(b) motion approximately eight months after this Court's decision in *Artuz*. A district court could reasonably conclude that this period reveals no lack of diligence on the part of an incarcerated *pro se* litigant.[3] And while we have received scant briefing on the probable merit of his petition, his allegation—that his guilty plea was not knowing and voluntary because it was based on grossly inaccurate advice about the actual time he would serve in prison—at least states a colorable claim of a constitutional violation. See *Finch* v. *Vaughn*, 67 F. 3d 909 (CA11 1995); see also *Mabry* v. *Johnson*, 467 U. S. 504 (1984).[4]

The Court relies on petitioner's supposed lack of diligence in pursuing review of the District Court's initial statute-of-

---

[3] While Rule 60(b)(6) contains no specific time limitation on filing, it is worth noting that petitioner filed his motion within the strict 1-year limitation that applies to motions under Rules 60(b)(1)–(3).

[4] It is also worth noting that *Artuz* v. *Bennett*, 531 U. S. 4 (2000), was decided only seven months after petitioner's habeas judgment became final. In cases where significant time has elapsed between a habeas judgment and the relevant change in procedural law, it would be within a district court's discretion to leave such a judgment in repose.

limitations ruling. See *ante*, at 537. In fact, petitioner did appeal the District Court's ruling, which the Court of Appeals correctly interpreted as a request for a certificate of appealability (COA).[5] As for petitioner's failure to seek rehearing or certiorari, he alleged in his Rule 60(b) motion, App. 16, and again in his reply brief, that he filed a timely petition for rehearing on April 18, 2000, but that the clerk of the Court of Appeals returned the motion unfiled, "explaining, erroneously, that his appeal was dismissed and closed on October 28, 1999." Reply Brief for Petitioner 13 (emphasis deleted). According to petitioner, "[t]his official misinformation carried the weight of a court decision and was enough to convince a *pro se* litigant (and some lawyers) that the 90-day window for filing a certiorari petition expired, as well." *Ibid.* The State, however, represents that petitioner erroneously filed the petition for rehearing under the case number of an earlier, dismissed appeal. Brief for Respondent 4.

[5] See Fed. Rule App. Proc. 22(b)(2) ("If no express request for a certificate is filed, the notice of [appeal shall be deemed to constitute] a request addressed to the judges of the court of appeals"). The procedural route that petitioner navigated was actually more complicated. After the Magistrate Judge initially recommended dismissal of the petition as time barred, petitioner filed an objection that raised a Third Circuit case, *Lovasz* v. *Vaughn*, 134 F. 3d 146 (1998), which was among the circuit cases that were later endorsed by *Artuz*, 531 U. S., at 8. The Magistrate's final report noted that the Eleventh Circuit had not addressed the relevant issue of tolling, and then proceeded to rely (oddly) on *Lovasz* to deny petitioner's claim. In my view, the citation to *Lovasz* and the Magistrate's acknowledgment that there was no Eleventh Circuit precedent on point provided a reasonable basis for the granting of a COA.

In fact, on September 23, 1998, petitioner filed an application for a COA, and this application was granted by the District Court. The Court of Appeals, however, dismissed petitioner's appeal on October 28, 1999, and remanded the COA for a determination of which specific issues merited permission to appeal. On remand, petitioner filed a new application for a COA, but this time the District Court denied the request. Petitioner then filed a timely appeal, and the District Court granted his motion to proceed *in forma pauperis* on appeal. The Court of Appeals then declined to issue a COA and dismissed the appeal on April 6, 2000.

I do not know how to resolve these allegations, but this only highlights the propriety of a remand. Even on the State's version of events, petitioner's attempt at filing for rehearing is proof of diligence on his part.

Putting these allegations aside, the Court's reasoning is too parsimonious. While petitioner could have shown even greater diligence by seeking rehearing for a second time and then filing for certiorari, we have never held *pro se* prisoners to the standards of counseled litigants. See, *e. g.*, *Haines* v. *Kerner*, 404 U. S. 519 (1972) *(per curiam)*. Indeed, petitioner's situation contrasts dramatically with that of the movant in the case the Court relies on, *Ackermann* v. *United States*, 340 U. S. 193 (1950). See *ante*, at 537–538. In upholding the denial of Rule 60(b)(6) relief in *Ackermann*, the Court put great emphasis on the fact that the movant had the benefit of paid counsel and that, for much of the relevant period, he was not detained, but rather enjoyed "freedom of movement and action," 340 U. S., at 201.[6] In any event, I believe that our rules governing prisoner litigation should favor a policy of repose rather than a policy that encourages multiple filings with a low probability of success.[7]

---

[6] *Ackermann* is further distinguishable in that it did not involve the sort of plain error of law that has been identified in this case. But even if *Ackermann* were not distinguishable, I would find the views expressed by Justices Black, Frankfurter, and Douglas in dissent, see 340 U. S., at 202 (opinion of Black, J.), more persuasive than those expressed by Justice Minton.

[7] A petition for certiorari seeking review of a denial of a COA has an objectively low chance of being granted. Such a decision is not thought to present a good vehicle for resolving legal issues, and error correction is a disfavored basis for granting review, particularly in noncapital cases. See generally this Court's Rule 10. As for the fact that this Court granted certiorari in *Artuz* eight days after the Eleventh Circuit denied petitioner a COA, it would be unrealistic to fault petitioner for failing to capitalize on this fortuity. In my experience, even lower courts and counseled litigants are often not aware of our grants of certiorari on issues that may be relevant to their current business. It would be particularly inappropriate to impose such a strict expectation on a *pro se* prisoner,

Accordingly, I agree with the Court's conclusion that petitioner filed a "true" Rule 60(b) motion. I respectfully dissent, however, because of the Court's decision to rule on the merits of the motion in the first instance.

---

particularly in the absence of any indication of when, given his circumstances in prison, he could have reasonably been expected to learn of our grant in *Artuz*.

Syllabus

EXXON MOBIL CORP. *v.* ALLAPATTAH SERVICES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04–70. Argued March 1, 2005—Decided June 23, 2005*

In No. 04–70, Exxon dealers filed a class action against Exxon Corporation, invoking the Federal District Court's 28 U. S. C. § 1332(a) diversity jurisdiction. After the dealers won a jury verdict, the court certified the case for interlocutory review on the question whether it had properly exercised § 1367 supplemental jurisdiction over the claims of class members who had not met § 1332(a)'s minimum amount-in-controversy requirement. The Eleventh Circuit upheld this extension of supplemental jurisdiction. In No. 04–79, a girl and her family sought damages from Star-Kist Foods, Inc., in a diversity action. The District Court granted Star-Kist summary judgment, finding that none of the plaintiffs had met the amount-in-controversy requirement. The First Circuit ruled that the girl, but not her family, had alleged the requisite amount, and then held that supplemental jurisdiction over the family's claims was improper because original jurisdiction is lacking in a diversity case if one plaintiff fails to satisfy the amount-in-controversy requirement.

Held: Where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies § 1332(a)'s amount-in-controversy requirement, § 1367 authorizes supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the requisite amount. Pp. 552–572.

(a) Although district courts may not exercise jurisdiction absent a statutory basis, once a court has original jurisdiction over some claims in an action, it may exercise supplemental jurisdiction over additional claims arising from the same case or controversy. See *Mine Workers* v. *Gibbs*, 383 U. S. 715. This expansive interpretation does not apply to § 1332's complete diversity requirement, for incomplete diversity destroys original jurisdiction with respect to all claims, leaving nothing to which supplemental claims can adhere. But other statutory prerequisites, including the federal-question and amount-in-controversy require-

---

*Together with No. 04–79, *del Rosario Ortega et al.* v. *Star-Kist Foods, Inc.*, on certiorari to the United States Court of Appeals for the First Circuit.

ments, can be analyzed claim by claim. Before § 1367 was enacted, every plaintiff had to separately satisfy the amount-in-controversy requirement, *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; *Zahn* v. *International Paper Co.*, 414 U. S. 291, and the grant of original jurisdiction over claims involving particular parties did not itself confer supplemental jurisdiction over additional claims involving other parties, *Finley* v. *United States*, 490 U. S. 545, 556. Pp. 552–557.

(b) All parties here agree that § 1367 overturned *Finley*, but there is no warrant for assuming that is all it did. To determine § 1367's scope requires examination of the statute's text in light of context, structure, and related statutory provisions. Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which district courts would have original jurisdiction. Its last sentence makes clear that this grant extends to claims involving joinder or intervention of additional parties. The question here is whether a diversity case in which the claims of some, but not all, plaintiffs satisfy the amount-in-controversy requirement qualifies as a "civil action of which the district courts have original jurisdiction," § 1367(a). Pp. 557–558.

(c) The answer must be yes. When a well-pleaded complaint has at least one claim satisfying the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim. A court with original jurisdiction over a single claim in the complaint has original jurisdiction over a "civil action" under § 1367(a), even if that action comprises fewer claims than were included in the complaint. Once a court has original jurisdiction over the action, it can then decide whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over other claims in the action. Section 1367(b), which contains exceptions to § 1367(a)'s broad rule, does not withdraw supplemental jurisdiction over the claims of the additional parties here. In fact, its exceptions support this Court's conclusion. Pp. 559–560.

(d) The Court cannot accept the alternative view, or its supporting theories, that a district court lacks original jurisdiction over a civil action unless it has original jurisdiction over every claim in the complaint. The "indivisibility theory"—that all claims must stand or fall as a single, indivisible action—is inconsistent with the whole notion of supplemental jurisdiction and is belied by this Court's practice of allowing federal courts to cure jurisdictional defects by dismissing the offending parties instead of the entire action. And the statute's broad and general language does not permit the theory to apply in diversity cases when it does not apply in federal-question cases. The "contamination theory"—that inclusion of a claim or party falling outside the district court's origi-

nal jurisdiction contaminates every other claim in the complaint—makes sense with respect to the complete diversity requirement because a nondiverse party's presence eliminates the justification for a federal forum. But it makes little sense with regard to the amount-in-controversy requirement, which is meant to ensure that a dispute is sufficiently important to warrant federal-court attention. It is fallacious to suppose, simply from the proposition that § 1332 imposes both requirements, that the contamination theory germane to the former also applies to the latter. This Court has already considered and rejected a virtually identical argument in the closely analogous removal-jurisdiction context. See *Chicago* v. *International College of Surgeons*, 522 U. S. 156. Pp. 560–566.

(e) In light of the statute's text and structure, § 1367's only plausible reading is that a court has original jurisdiction over a civil action comprising the claims for which there is no jurisdictional defect. Though a single nondiverse party can contaminate every other claim in a lawsuit, contamination does not occur with respect to jurisdictional defects going only to the substantive importance of individual claims. Thus, § 1367(a)'s threshold requirement is satisfied in cases, such as these, where some but not all of the plaintiffs in a diversity action allege a sufficient amount in controversy. Section 1367 by its plain text overruled *Clark* and *Zahn* and authorized supplemental jurisdiction over all claims by diverse parties arising out of the same case or controversy, subject only to enumerated exceptions not applicable here. Pp. 566–567.

(f) Because § 1367 is not ambiguous, this Court need not examine other interpretative tools, including legislative history. Even were it appropriate to do so, the Court would not give the legislative history significant weight. Pp. 567–571.

(g) The Class Action Fairness Act has no impact on the analysis of these cases. Pp. 571–572.

No. 04–70, 333 F. 3d 1248, affirmed; and No. 04–79, 370 F. 3d 124, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 572. GINSBURG, J., filed a dissenting opinion, in which STEVENS, O'CONNOR, and BREYER, JJ., joined, *post*, p. 577.

Carter G. Phillips argued the cause for petitioner in No. 04–70. With him on the briefs was *Virginia A. Seitz*. *Donald B. Ayer* argued the cause for petitioners in No. 04–79. With him on the briefs were *Michael S. Fried*,

Christian G. Vergonis, Freddie Perez-Gonzalez, and *Robert H. Klonoff.*

Eugene E. Stearns argued the cause for respondents in No. 04–70. With him on the briefs were *Mark P. Dikeman, Mona E. Markus, Matthew W. Buttrick,* and *David C. Pollack. Robert A. Long, Jr.,* argued the cause for respondent in No. 04–79. With him on the brief were *Jeremy D. Kernodle, Scott T. Rickman,* and *David J. Herman.*†

JUSTICE KENNEDY delivered the opinion of the Court.

These consolidated cases present the question whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. Our decision turns on the correct interpretation of 28 U. S. C. §1367. The question has divided the Courts of Appeals, and we granted certiorari to resolve the conflict. 543 U. S. 924 (2004).

We hold that, where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, §1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction. We affirm the judgment of the Court of Appeals for the Eleventh Circuit in No. 04–70, and we reverse

†A brief of *amicus curiae* urging reversal in No. 04–79 was filed for the United States by *Acting Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Hungar, Deanne E. Maynard, Mark B. Stern,* and *Alisa B. Klein.*

Briefs of *amici curiae* urging affirmance in No. 04–70 were filed for the United States by *Mr. Clement, Acting Assistant Attorney General Schiffer, Mr. Hungar, Ms. Maynard, Mr. Stern,* and *Ms. Klein;* and for the Product Liability Advisory Council, Inc., by *Robert N. Weiner.*

the judgment of the Court of Appeals for the First Circuit in No. 04–79.

I

In 1991, about 10,000 Exxon dealers filed a class-action suit against the Exxon Corporation in the United States District Court for the Northern District of Florida. The dealers alleged an intentional and systematic scheme by Exxon under which they were overcharged for fuel purchased from Exxon. The plaintiffs invoked the District Court's § 1332(a) diversity jurisdiction. After a unanimous jury verdict in favor of the plaintiffs, the District Court certified the case for interlocutory review, asking whether it had properly exercised § 1367 supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy.

The Court of Appeals for the Eleventh Circuit upheld the District Court's extension of supplemental jurisdiction to these class members. *Allapattah Services, Inc.* v. *Exxon Corp.*, 333 F. 3d 1248 (2003). "[W]e find," the court held, "that § 1367 clearly and unambiguously provides district courts with the authority in diversity class actions to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the district court has original jurisdiction over the claims of at least one of the class representatives." *Id.*, at 1256. This decision accords with the views of the Courts of Appeals for the Fourth, Sixth, and Seventh Circuits. See *Rosmer* v. *Pfizer, Inc.*, 263 F. 3d 110 (CA4 2001); *Olden* v. *LaFarge Corp.*, 383 F. 3d 495 (CA6 2004); *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F. 3d 928 (CA7 1996); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F. 3d 599 (CA7 1997). The Courts of Appeals for the Fifth and Ninth Circuits, adopting a similar analysis of the statute, have held that in a diversity class action the unnamed class members need not meet the amount-in-controversy requirement, provided the named class members

do. These decisions, however, are unclear on whether all the named plaintiffs must satisfy this requirement. *In re Abbott Labs.*, 51 F. 3d 524 (CA5 1995); *Gibson* v. *Chrysler Corp.*, 261 F. 3d 927 (CA9 2001).

In the other case now before us the Court of Appeals for the First Circuit took a different position on the meaning of § 1367(a). 370 F. 3d 124 (2004). In that case, a 9-year-old girl sued Star-Kist in a diversity action in the United States District Court for the District of Puerto Rico, seeking damages for unusually severe injuries she received when she sliced her finger on a tuna can. Her family joined in the suit, seeking damages for emotional distress and certain medical expenses. The District Court granted summary judgment to Star-Kist, finding that none of the plaintiffs met the minimum amount-in-controversy requirement. The Court of Appeals for the First Circuit, however, ruled that the injured girl, but not her family members, had made allegations of damages in the requisite amount.

The Court of Appeals then addressed whether, in light of the fact that one plaintiff met the requirements for original jurisdiction, supplemental jurisdiction over the remaining plaintiffs' claims was proper under § 1367. The court held that § 1367 authorizes supplemental jurisdiction only when the district court has original jurisdiction over the action, and that in a diversity case original jurisdiction is lacking if one plaintiff fails to satisfy the amount-in-controversy requirement. Although the Court of Appeals claimed to "express no view" on whether the result would be the same in a class action, *id.*, at 143, n. 19, its analysis is inconsistent with that of the Court of Appeals for the Eleventh Circuit. The Court of Appeals for the First Circuit's view of § 1367 is, however, shared by the Courts of Appeals for the Third, Eighth, and Tenth Circuits, and the latter two Courts of Appeals have expressly applied this rule to class actions. See *Meritcare, Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F. 3d 214 (CA3 1999); *Trimble* v. *Asarco, Inc.*, 232 F. 3d 946 (CA8

2000); *Leonhardt* v. *Western Sugar Co.*, 160 F. 3d 631 (CA10 1998).

II

A

The district courts of the United States, as we have said many times, are "courts of limited jurisdiction. They possess only that power authorized by Constitution and statute," *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994). In order to provide a federal forum for plaintiffs who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction in federal-question cases—civil actions that arise under the Constitution, laws, or treaties of the United States. 28 U. S. C. § 1331. In order to provide a neutral forum for what have come to be known as diversity cases, Congress also has granted district courts original jurisdiction in civil actions between citizens of different States, between U. S. citizens and foreign citizens, or by foreign states against U. S. citizens. § 1332. To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, § 1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently $75,000.

Although the district courts may not exercise jurisdiction absent a statutory basis, it is well established—in certain classes of cases—that, once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy. The leading modern case for this principle is *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). In *Gibbs*, the plaintiff alleged the defendant's conduct violated both federal and state law. The District Court, *Gibbs* held, had original jurisdiction over the action based on the federal claims. *Gibbs* confirmed that the District Court had the additional power (though not the obligation) to exercise supplemental jurisdiction over related state claims that arose from

the same Article III case or controversy. *Id.*, at 725 ("The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . [A]ssuming substantiality of the federal issues, there is *power* in federal courts to hear the whole").

As we later noted, the decision allowing jurisdiction over pendent state claims in *Gibbs* did not mention, let alone come to grips with, the text of the jurisdictional statutes and the bedrock principle that federal courts have no jurisdiction without statutory authorization. *Finley* v. *United States*, 490 U. S. 545, 548 (1989). In *Finley*, we nonetheless reaffirmed and rationalized *Gibbs* and its progeny by inferring from it the interpretive principle that, in cases involving supplemental jurisdiction over additional claims between parties properly in federal court, the jurisdictional statutes should be read broadly, on the assumption that in this context Congress intended to authorize courts to exercise their full Article III power to dispose of an "'entire action before the court [which] comprises but one constitutional "case."'" 490 U. S., at 549 (quoting *Gibbs*, *supra*, at 725).

We have not, however, applied *Gibbs*' expansive interpretive approach to other aspects of the jurisdictional statutes. For instance, we have consistently interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action. *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 375 (1978). The complete diversity requirement is not mandated by the Constitution, *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531 (1967), or by the plain text of § 1332(a). The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be

perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action. See *Wisconsin Dept. of Corrections* v. *Schacht*, 524 U. S. 381, 389 (1998); *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 829 (1989). The specific purpose of the complete diversity rule explains both why we have not adopted *Gibbs*' expansive interpretive approach to this aspect of the jurisdictional statute and why *Gibbs* does not undermine the complete diversity rule. In order for a federal court to invoke supplemental jurisdiction under *Gibbs*, it must first have original jurisdiction over at least one claim in the action. Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.

In contrast to the diversity requirement, most of the other statutory prerequisites for federal jurisdiction, including the federal-question and amount-in-controversy requirements, can be analyzed claim by claim. True, it does not follow by necessity from this that a district court has authority to exercise supplemental jurisdiction over all claims provided there is original jurisdiction over just one. Before the enactment of § 1367, the Court declined in contexts other than the pendent-claim instance to follow *Gibbs*' expansive approach to interpretation of the jurisdictional statutes. The Court took a more restrictive view of the proper interpretation of these statutes in so-called pendent-party cases involving supplemental jurisdiction over claims involving additional parties—plaintiffs or defendants—where the district courts would lack original jurisdiction over claims by each of the parties standing alone.

Thus, with respect to plaintiff-specific jurisdictional requirements, the Court held in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939), that every plaintiff must separately satisfy the amount-in-controversy requirement. Though *Clark* was

a federal-question case, at that time federal-question jurisdiction had an amount-in-controversy requirement analogous to the amount-in-controversy requirement for diversity cases. "Proper practice," *Clark* held, "requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved." *Id.*, at 590. The Court reaffirmed this rule, in the context of a class action brought invoking § 1332(a) diversity jurisdiction, in *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973). It follows "inescapably" from *Clark*, the Court held in *Zahn*, that "any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." 414 U. S., at 300.

The Court took a similar approach with respect to supplemental jurisdiction over claims against additional defendants that fall outside the district courts' original jurisdiction. In *Aldinger* v. *Howard*, 427 U. S. 1 (1976), the plaintiff brought a Rev. Stat. § 1979, 42 U. S. C. § 1983, action against county officials in District Court pursuant to the statutory grant of jurisdiction in 28 U. S. C. § 1343(3) (1976 ed.). The plaintiff further alleged the court had supplemental jurisdiction over her related state-law claims against the county, even though the county was not suable under § 1983 and so was not subject to § 1343(3)'s original jurisdiction. The Court held that supplemental jurisdiction could not be exercised because Congress, in enacting § 1343(3), had declined (albeit implicitly) to extend federal jurisdiction over any party who could not be sued under the federal civil rights statutes. 427 U. S., at 16–19. "Before it can be concluded that [supplemental] jurisdiction [over additional parties] exists," *Aldinger* held, "a federal court must satisfy itself not only that Art[icle] III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Id.*, at 18.

In *Finley* v. *United States*, 490 U. S. 545 (1989), we confronted a similar issue in a different statutory context. The plaintiff in *Finley* brought a Federal Tort Claims Act negligence suit against the Federal Aviation Administration in District Court, which had original jurisdiction under § 1346(b). The plaintiff tried to add related claims against other defendants, invoking the District Court's supplemental jurisdiction over so-called pendent parties. We held that the District Court lacked a sufficient statutory basis for exercising supplemental jurisdiction over these claims. Relying primarily on *Zahn*, *Aldinger*, and *Kroger*, we held in *Finley* that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties." 490 U. S., at 556. While *Finley* did not "limit or impair" *Gibbs*' liberal approach to interpreting the jurisdictional statutes in the context of supplemental jurisdiction over additional claims involving the same parties, 490 U. S., at 556, *Finley* nevertheless declined to extend that interpretive assumption to claims involving additional parties. *Finley* held that in the context of parties, in contrast to claims, "we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly." *Id.*, at 549.

As the jurisdictional statutes existed in 1989, then, here is how matters stood: First, the diversity requirement in § 1332(a) required complete diversity; absent complete diversity, the district court lacked original jurisdiction over all of the claims in the action. *Strawbridge*, 3 Cranch, at 267–268; *Kroger*, 437 U. S., at 373–374. Second, if the district court had original jurisdiction over at least one claim, the jurisdictional statutes implicitly authorized supplemental jurisdiction over all other claims between the same parties arising out of the same Article III case or controversy. *Gibbs*, 383 U. S., at 725. Third, even when the district court had origi-

nal jurisdiction over one or more claims between particular parties, the jurisdictional statutes did not authorize supplemental jurisdiction over additional claims involving other parties. *Clark*, 306 U. S., at 590; *Zahn*, *supra*, at 300–301; *Finley*, *supra*, at 556.

B

In *Finley* we emphasized that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." 490 U. S., at 556. In 1990, Congress accepted the invitation. It passed the Judicial Improvements Act, 104 Stat. 5089, which enacted § 1367, the provision which controls these cases.

Section 1367 provides, in relevant part:

> "(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> "(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

All parties to this litigation and all courts to consider the question agree that § 1367 overturned the result in *Finley*. There is no warrant, however, for assuming that § 1367 did no more than to overrule *Finley* and otherwise to codify the existing state of the law of supplemental jurisdiction. We must not give jurisdictional statutes a more expansive interpretation than their text warrants, 490 U. S., at 549, 556; but it is just as important not to adopt an artificial construction that is narrower than what the text provides. No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds. Ordinary principles of statutory construction apply. In order to determine the scope of supplemental jurisdiction authorized by § 1367, then, we must examine the statute's text in light of context, structure, and related statutory provisions.

Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction. The last sentence of § 1367(a) makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties. The single question before us, therefore, is whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a "civil action of which the district courts have original jurisdiction." If the answer is yes, § 1367(a) confers supplemental jurisdiction over all claims, including those that do not independently satisfy the amount-in-controversy requirement, if the claims are part of the same Article III case or controversy. If the answer is no, § 1367(a) is inapplicable and, in light of our holdings in *Clark* and *Zahn*, the district court has no statutory basis for exercising supplemental jurisdiction over the additional claims.

We now conclude the answer must be yes. When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question, has original jurisdiction over that claim. The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment. If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint. Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.

Section 1367(a) commences with the direction that §§ 1367(b) and (c), or other relevant statutes, may provide specific exceptions, but otherwise § 1367(a) is a broad jurisdictional grant, with no distinction drawn between pendent-claim and pendent-party cases. In fact, the last sentence of § 1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties. The terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction. Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are "two species of the same generic problem," *Kroger*, 437 U. S., at 370. Nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.

If § 1367(a) were the sum total of the relevant statutory language, our holding would rest on that language alone.

The statute, of course, instructs us to examine § 1367(b) to determine if any of its exceptions apply, so we proceed to that section. While § 1367(b) qualifies the broad rule of § 1367(a), it does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here. The specific exceptions to § 1367(a) contained in § 1367(b), moreover, provide additional support for our conclusion that § 1367(a) confers supplemental jurisdiction over these claims. Section 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under Federal Rule of Civil Procedure 19, or who seek to intervene pursuant to Rule 24. Nothing in the text of § 1367(b), however, withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 (like the additional plaintiffs in No. 04–79) or certified as class-action members pursuant to Rule 23 (like the additional plaintiffs in No. 04–70). The natural, indeed the necessary, inference is that § 1367 confers supplemental jurisdiction over claims by Rule 20 and Rule 23 plaintiffs. This inference, at least with respect to Rule 20 plaintiffs, is strengthened by the fact that § 1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined under Rule 20.

We cannot accept the view, urged by some of the parties, commentators, and Courts of Appeals, that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint. As we understand this position, it requires assuming either that all claims in the complaint must stand or fall as a single, indivisible "civil action" as a matter of definitional necessity—what we will refer to as the "indivisibility theory"—or else that the inclusion of a claim or party falling outside the district court's original jurisdiction somehow contaminates every other claim in the complaint, depriving the court of original jurisdiction over any of these claims—what we will refer to as the "contamination theory."

The indivisibility theory is easily dismissed, as it is inconsistent with the whole notion of supplemental jurisdiction. If a district court must have original jurisdiction over every claim in the complaint in order to have "original jurisdiction" over a "civil action," then in *Gibbs* there was no civil action of which the district court could assume original jurisdiction under § 1331, and so no basis for exercising supplemental jurisdiction over any of the claims. The indivisibility theory is further belied by our practice—in both federal-question and diversity cases—of allowing federal courts to cure jurisdictional defects by dismissing the offending parties rather than dismissing the entire action. *Clark*, for example, makes clear that claims that are jurisdictionally defective as to amount in controversy do not destroy original jurisdiction over other claims. 306 U. S., at 590 (dismissing parties who failed to meet the amount-in-controversy requirement but retaining jurisdiction over the remaining party). If the presence of jurisdictionally problematic claims in the complaint meant the district court was without original jurisdiction over the single, indivisible civil action before it, then the district court would have to dismiss the whole action rather than particular parties.

We also find it unconvincing to say that the definitional indivisibility theory applies in the context of diversity cases but not in the context of federal-question cases. The broad and general language of the statute does not permit this result. The contention is premised on the notion that the phrase "original jurisdiction of all civil actions" means different things in §§ 1331 and 1332. It is implausible, however, to say that the identical phrase means one thing (original jurisdiction in all actions where at least one claim in the complaint meets the following requirements) in § 1331 and something else (original jurisdiction in all actions where every claim in the complaint meets the following requirements) in § 1332.

The contamination theory, as we have noted, can make some sense in the special context of the complete diversity requirement because the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum. The theory, however, makes little sense with respect to the amount-in-controversy requirement, which is meant to ensure that a dispute is sufficiently important to warrant federal-court attention. The presence of a single nondiverse party may eliminate the fear of bias with respect to all claims, but the presence of a claim that falls short of the minimum amount in controversy does nothing to reduce the importance of the claims that do meet this requirement.

It is fallacious to suppose, simply from the proposition that § 1332 imposes both the diversity requirement and the amount-in-controversy requirement, that the contamination theory germane to the former is also relevant to the latter. There is no inherent logical connection between the amount-in-controversy requirement and § 1332 diversity jurisdiction. After all, federal-question jurisdiction once had an amount-in-controversy requirement as well. If such a requirement were revived under § 1331, it is clear beyond peradventure that § 1367(a) provides supplemental jurisdiction over federal-question cases where some, but not all, of the federal-law claims involve a sufficient amount in controversy. In other words, § 1367(a) unambiguously overrules the holding and the result in *Clark*. If that is so, however, it would be quite extraordinary to say that § 1367 did not also overrule *Zahn*, a case that was premised in substantial part on the holding in *Clark*.

In addition to the theoretical difficulties with the argument that a district court has original jurisdiction over a civil action only if it has original jurisdiction over each individual claim in the complaint, we have already considered and rejected a virtually identical argument in the closely analogous context of removal jurisdiction. In *Chicago* v. *In-*

ternational College of Surgeons, 522 U. S. 156 (1997), the plaintiff brought federal- and state-law claims in state court. The defendant removed to federal court. The plaintiff objected to removal, citing the text of the removal statute, § 1441(a). That statutory provision, which bears a striking similarity to the relevant portion of § 1367, authorizes removal of "any civil action . . . of which the district courts of the United States have original jurisdiction . . . ." The *College of Surgeons* plaintiff urged that, because its state-law claims were not within the District Court's original jurisdiction, § 1441(a) did not authorize removal. We disagreed. The federal-law claims, we held, "suffice to make the actions 'civil actions' within the 'original jurisdiction' of the district courts . . . . Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that [the plaintiff's] complaints, by virtue of their federal claims, were 'civil actions' within the federal courts' 'original jurisdiction.'" *Id.*, at 166. Once the case was removed, the District Court had original jurisdiction over the federal-law claims and supplemental jurisdiction under § 1367(a) over the state-law claims. *Id.*, at 165.

The dissent in *College of Surgeons* argued that because the plaintiff sought on-the-record review of a local administrative agency decision, the review it sought was outside the scope of the District Court's jurisdiction. *Id.*, at 177 (opinion of GINSBURG, J.). We rejected both the suggestion that state-law claims involving administrative appeals are beyond the scope of § 1367 supplemental jurisdiction, *id.*, at 168–172 (opinion of the Court), and the claim that the administrative review posture of the case deprived the District Court of original jurisdiction over the federal-law claims in the case, *id.*, at 163–168. More importantly for present purposes, *College of Surgeons* stressed that a district court has original jurisdiction of a civil action for purposes of § 1441(a) as long as it has original jurisdiction over a subset of the claims constituting the action. Even the *College of Surgeons* dis-

sent, which took issue with the Court's interpretation of § 1367, did not appear to contest this view of § 1441(a).

Although *College of Surgeons* involved additional claims between the same parties, its interpretation of § 1441(a) applies equally to cases involving additional parties whose claims fall short of the jurisdictional amount. If we were to adopt the contrary view that the presence of additional parties means there is no "civil action . . . of which the district courts . . . have original jurisdiction," those cases simply would not be removable. To our knowledge, no court has issued a reasoned opinion adopting this view of the removal statute. It is settled, of course, that absent complete diversity a case is not removable because the district court would lack original jurisdiction. *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 73 (1996). This, however, is altogether consistent with our view of § 1441(a). A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.

We also reject the argument, similar to the attempted distinction of *College of Surgeons* discussed above, that while the presence of additional claims over which the district court lacks jurisdiction does not mean the civil action is outside the purview of § 1367(a), the presence of additional parties does. The basis for this distinction is not altogether clear, and it is in considerable tension with statutory text. Section 1367(a) applies by its terms to any civil action of which the district courts have original jurisdiction, and the last sentence of § 1367(a) expressly contemplates that the court may have supplemental jurisdiction over additional parties. So it cannot be the case that the presence of those parties destroys the court's original jurisdiction, within the meaning of § 1367(a), over a civil action otherwise properly before it. Also, § 1367(b) expressly withholds supplemental jurisdiction in diversity cases over claims by plaintiffs joined as indispensable parties under Rule 19. If joinder of such

parties were sufficient to deprive the district court of original jurisdiction over the civil action within the meaning of § 1367(a), this specific limitation on supplemental jurisdiction in § 1367(b) would be superfluous. The argument that the presence of additional parties removes the civil action from the scope of § 1367(a) also would mean that § 1367 left the *Finley* result undisturbed. *Finley*, after all, involved a Federal Tort Claims Act suit against a federal defendant and state-law claims against additional defendants not otherwise subject to federal jurisdiction. Yet all concede that one purpose of § 1367 was to change the result reached in *Finley*.

Finally, it is suggested that our interpretation of § 1367(a) creates an anomaly regarding the exceptions listed in § 1367(b): It is not immediately obvious why Congress would withhold supplemental jurisdiction over plaintiffs joined as parties "needed for just adjudication" under Rule 19 but would allow supplemental jurisdiction over plaintiffs permissively joined under Rule 20. The omission of Rule 20 plaintiffs from the list of exceptions in § 1367(b) may have been an "unintentional drafting gap," *Meritcare*, 166 F. 3d, at 221, and n. 6. If that is the case, it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd. An alternative explanation for the different treatment of Rules 19 and 20 is that Congress was concerned that extending supplemental jurisdiction to Rule 19 plaintiffs would allow circumvention of the complete diversity rule: A nondiverse plaintiff might be omitted intentionally from the original action, but joined later under Rule 19 as a necessary party. See *Stromberg Metal Works*, 77 F. 3d, at 932. The contamination theory described above, if applicable, means this ruse would fail, but Congress may have wanted to make assurance double sure. More generally, Congress may have concluded that federal jurisdiction is only appropriate if the district court would have original jurisdiction over the claims of all those plaintiffs who are so essential to the action that they could be joined under Rule 19.

To the extent that the omission of Rule 20 plaintiffs from the list of § 1367(b) exceptions is anomalous, moreover, it is no more anomalous than the inclusion of Rule 19 plaintiffs in that list would be if the alternative view of § 1367(a) were to prevail. If the district court lacks original jurisdiction over a civil diversity action where any plaintiff's claims fail to comply with all the requirements of § 1332, there is no need for a special § 1367(b) exception for Rule 19 plaintiffs who do not meet these requirements. Though the omission of Rule 20 plaintiffs from § 1367(b) presents something of a puzzle on our view of the statute, the inclusion of Rule 19 plaintiffs in this section is at least as difficult to explain under the alternative view.

And so we circle back to the original question. When the well-pleaded complaint in district court includes multiple claims, all part of the same case or controversy, and some, but not all, of the claims are within the court's original jurisdiction, does the court have before it "any civil action of which the district courts have original jurisdiction"? It does. Under § 1367, the court has original jurisdiction over the civil action comprising the claims for which there is no jurisdictional defect. No other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute. Though the special nature and purpose of the diversity requirement mean that a single nondiverse party can contaminate every other claim in the lawsuit, the contamination does not occur with respect to jurisdictional defects that go only to the substantive importance of individual claims.

It follows from this conclusion that the threshold requirement of § 1367(a) is satisfied in cases, like those now before us, where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy. We hold that § 1367 by its plain text overruled *Clark* and *Zahn* and authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or con-

troversy, subject only to enumerated exceptions not applicable in the cases now before us.

C

The proponents of the alternative view of § 1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools, including the legislative history of § 1367, which supposedly demonstrate Congress did not intend § 1367 to overrule *Zahn*. We can reject this argument at the very outset simply because § 1367 is not ambiguous. For the reasons elaborated above, interpreting § 1367 to foreclose supplemental jurisdiction over plaintiffs in diversity cases who do not meet the minimum amount in controversy is inconsistent with the text, read in light of other statutory provisions and our established jurisprudence. Even if we were to stipulate, however, that the reading these proponents urge upon us is textually plausible, the legislative history cited to support it would not alter our view as to the best interpretation of § 1367.

Those who urge that the legislative history refutes our interpretation rely primarily on the House Judiciary Committee Report on the Judicial Improvements Act. H. R. Rep. No. 101–734 (1990) (House Report or Report). This Report explained that § 1367 would "authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction." *Id.*, at 28. The Report stated that § 1367(a) "generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim or claims that provide the basis of the district court's original jurisdiction," and in so doing codifies *Gibbs* and fills the statutory gap recognized in *Finley*. House Report, at 28–29, and n. 15. The Report then remarked that § 1367(b) "is not intended to affect the jurisdictional requirements of [§ 1332] in diversity-only class

actions, as those requirements were interpreted prior to *Finley*," citing, without further elaboration, *Zahn* and *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356 (1921). House Report, at 29, and n. 17. The Report noted that the "net effect" of § 1367(b) was to implement the "principal rationale" of *Kroger*, House Report, at 29, and n. 16, effecting only "one small change" in pre-*Finley* practice with respect to diversity actions: § 1367(b) would exclude "Rule 23(a) plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19." House Report, at 29. (It is evident that the report here meant to refer to Rule 24, not Rule 23.)

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable

in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.

First of all, the legislative history of § 1367 is far murkier than selective quotation from the House Report would suggest. The text of § 1367 is based substantially on a draft proposal contained in a Federal Court Study Committee working paper, which was drafted by a Subcommittee chaired by Judge Posner. Report of the Subcommittee on the Role of the Federal Courts and Their Relationship to the States 567–568 (Mar. 12, 1990), reprinted in 1 Judicial Conference of the United States, Federal Courts Study Committee, Working Papers and Subcommittee Reports (July 1, 1990) (Subcommittee Working Paper). See also Judicial Conference of the United States, Report of the Federal Courts Study Committee 47–48 (Apr. 2, 1990) (Study Committee Report) (echoing, in brief summary form, the Subcommittee Working Paper proposal and noting that the Subcommittee Working Paper "contains additional material on this subject"); House Report, at 27 ("[Section 1367] implements a recommendation of the Federal Courts Study Committee found on pages 47 and 48 of its Report"). While the Subcommittee explained, in language echoed by the House Report, that its proposal "basically restores the law as it existed prior to *Finley*," Subcommittee Working Paper, at 561, it observed in a footnote that its proposal would overrule *Zahn* and that this would be a good idea, Subcommittee Working Paper, at 561, n. 33. Although the Federal Courts Study Committee did not expressly adopt the Subcommittee's specific reference to *Zahn*, it neither explicitly disagreed with the Subcommittee's conclusion that this was the best reading of the proposed text nor substantially modified the proposal to avoid this result. Study Committee Report, at 47–48. Therefore, even if the House Report could fairly be read to reflect an understanding that the text of § 1367 did not overrule *Zahn*, the Subcommittee Working Paper on

which § 1367 was based reflected the opposite understanding. The House Report is no more authoritative than the Subcommittee Working Paper. The utility of either can extend no further than the light it sheds on how the enacting Legislature understood the statutory text. Trying to figure out how to square the Subcommittee Working Paper's understanding with the House Report's understanding, or which is more reflective of the understanding of the enacting legislators, is a hopeless task.

Second, the worst fears of critics who argue legislative history will be used to circumvent the Article I process were realized in this case. The telltale evidence is the statement, by three law professors who participated in drafting § 1367, see House Report, at 27, n. 13, that § 1367 "on its face" permits "supplemental jurisdiction over claims of class members that do not satisfy section 1332's jurisdictional amount requirement, which would overrule *[Zahn]*. [There is] a disclaimer of intent to accomplish this result in the legislative history. . . . It would have been better had the statute dealt explicitly with this problem, and the legislative history was an attempt to correct the oversight." Rowe, Burbank, & Mengler, Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L. J. 943, 960, n. 90 (1991). The professors were frank to concede that if one refuses to consider the legislative history, one has no choice but to "conclude that section 1367 has wiped *Zahn* off the books." *Ibid.* So there exists an acknowledgment, by parties who have detailed, specific knowledge of the statute and the drafting process, both that the plain text of § 1367 overruled *Zahn* and that language to the contrary in the House Report was a *post hoc* attempt to alter that result. One need not subscribe to the wholesale condemnation of legislative history to refuse to give any effect to such a deliberate effort to amend a statute through a committee report.

In sum, even if we believed resort to legislative history were appropriate in these cases—a point we do not concede—we would not give significant weight to the House Report. The distinguished jurists who drafted the Subcommittee Working Paper, along with three of the participants in the drafting of § 1367, agree that this provision, on its face, overrules *Zahn*. This accords with the best reading of the statute's text, and nothing in the legislative history indicates directly and explicitly that Congress understood the phrase "civil action of which the district courts have original jurisdiction" to exclude cases in which some but not all of the diversity plaintiffs meet the amount-in-controversy requirement.

No credence, moreover, can be given to the claim that, if Congress understood § 1367 to overrule *Zahn*, the proposal would have been more controversial. We have little sense whether any Member of Congress would have been particularly upset by this result. This is not a case where one can plausibly say that concerned legislators might not have realized the possible effect of the text they were adopting. Certainly, any competent legislative aide who studied the matter would have flagged this issue if it were a matter of importance to his or her boss, especially in light of the Subcommittee Working Paper. There are any number of reasons why legislators did not spend more time arguing over § 1367, none of which are relevant to our interpretation of what the words of the statute mean.

D

Finally, we note that the Class Action Fairness Act (CAFA), Pub. L. 109–2, 119 Stat. 4, enacted this year, has no bearing on our analysis of these cases. Subject to certain limitations, the CAFA confers federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds $5 million. It abrogates the rule against aggregating claims, a rule this Court recognized in *Ben-Hur* and reaffirmed in *Zahn*. The CAFA, however, is not retro-

active, and the views of the 2005 Congress are not relevant to our interpretation of a text enacted by Congress in 1990. The CAFA, moreover, does not moot the significance of our interpretation of § 1367, as many proposed exercises of supplemental jurisdiction, even in the class-action context, might not fall within the CAFA's ambit. The CAFA, then, has no impact, one way or the other, on our interpretation of § 1367.

* * *

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed. The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

JUSTICE GINSBURG's carefully reasoned opinion, *post*, at 577 (dissenting opinion), demonstrates the error in the Court's rather ambitious reading of this opaque jurisdictional statute. She also has demonstrated that "ambiguity" is a term that may have different meanings for different judges, for the Court has made the remarkable declaration that its reading of the statute is so obviously correct—and JUSTICE GINSBURG's so obviously wrong—that the text does not even qualify as "ambiguous." See *ante*, at 567. Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted. Indeed, I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. 50, 65–66, and n. 1 (2004) (STEVENS, J., concurring).

The legislative history of 28 U. S. C. § 1367 provides powerful confirmation of JUSTICE GINSBURG's interpretation of that statute. It is helpful to consider in full the relevant portion of the House Report, which was also adopted by the Senate:

> "This section would authorize jurisdiction in a case like *Finley* [v. *United States*, 490 U. S. 545 (1989)], as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction. In federal question cases, it broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties. In diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute.
>
> . . . . .
>
> "Subsection 114(b) [§ 1367(b)] prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity provision, 28 U. S. C. § 1332, from exercising supplemental jurisdiction in specified circumstances. [Footnote 16: 'The net effect of subsection (b) is to implement the principal rationale of *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978)'.] In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of 28 U. S. C. § 1332 by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis. In accord with case law, the subsection

> also prohibits the joinder or intervention of persons or plaintiffs if adding them is inconsistent with section 1332's requirements. The section is not intended to affect the jurisdictional requirements of 28 U. S. C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley. [Footnote 17: 'See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356 (1921); *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973)'.]
>
> "Subsection (b) makes one small change in pre-*Finley* practice. Anomalously, under current practice, the same party might intervene as of right under Federal Rule of Civil Procedure 23(a) and take advantage of supplemental jurisdiction, but not come within supplemental jurisdiction if parties already in the action sought to effect the joinder under Rule 19. Subsection (b) would eliminate this anomaly, excluding Rule 23(a) plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19." H. R. Rep. No. 101–734, pp. 28–29 (1990) (footnote omitted) (hereinafter House Report or Report).[1]

Not only does the House Report specifically say that § 1367 was not intended to upset *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973), but its entire explanation of the statute demonstrates that Congress had in mind a very specific and relatively modest task—undoing this Court's 5-to-4 decision in *Finley* v. *United States*, 490 U. S. 545 (1989). In addition to overturning that unfortunate and much-criticized decision,[2] the statute, according to the Report, codifies and preserves "the pre-*Finley* understandings of the authorization

---

[1] The last quoted paragraph was intended to refer to Rule 24, not Rule 23. See *ante*, at 568.

[2] As I pointed out in my dissent in *Finley*, the majority's decision was "not faithful to our precedents," 490 U. S., at 558, and casually dismissed the accumulated wisdom of judges such as Henry Friendly, who had "special learning and expertise in matters of federal jurisdiction," *id.*, at 565.

for and limits on other forms of supplemental jurisdiction," House Report, at 28, with the exception of making "one small change in pre-*Finley* practice," *id.*, at 29, which is not relevant here.

The sweeping purpose that the Court's decision imputes to Congress bears no resemblance to the House Report's description of the statute. But this does not seem to trouble the Court, for its decision today treats statutory interpretation as a pedantic exercise, divorced from any serious attempt at ascertaining congressional intent. Of course, there are situations in which we do not honor Congress' apparent intent unless that intent is made "clear" in the text of a statute—in this way, we can be certain that Congress considered the issue and intended a disfavored outcome, see, *e. g.*, *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994) (requiring clear statement for retroactive civil legislation). But that principle provides no basis for discounting the House Report, given that our cases have never recognized a presumption in *favor* of expansive diversity jurisdiction.

The Court's reasons for ignoring this virtual billboard of congressional intent are unpersuasive. That a subcommittee of the Federal Courts Study Committee believed that an earlier, substantially similar version of the statute overruled *Zahn*, see *ante*, at 569, only highlights the fact that the statute is ambiguous. What is determinative is that the House Report explicitly rejected that broad reading of the statutory text. Such a report has special significance as an indicator of legislative intent. In Congress, committee reports are normally considered the authoritative explication of a statute's text and purposes, and busy legislators and their assistants rely on that explication in casting their votes. Cf. *Garcia* v. *United States*, 469 U. S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congress-

men involved in drafting and studying proposed legislation'" (quoting *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969); brackets in original)).

The Court's second reason—its comment on the three law professors who participated in drafting § 1367, see *ante*, at 570—is similarly off the mark. In the law review article that the Court refers to, the professors were merely saying that the text of the statute was susceptible to an overly broad (and simplistic) reading, and that clarification in the House Report was therefore appropriate. See Rowe, Burbank, & Mengler, Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L. J. 943, 960, n. 90 (1991).[3] Significantly, the reference to *Zahn* in the House Report does not at all appear to be tacked on or out of place; indeed, it is wholly consistent with the Report's broader explanation of Congress' goal of overruling *Finley* and preserving pre-*Finley* law. To suggest that these professors participated in a "deliberate effort to amend a statute through a committee report," *ante*, at 570, reveals an unrealistic view of the legislative process, not to mention disrespect for three law professors who acted in the role of public servants. To be sure, legislative history can be manipulated. But, in the sit-

---

[3] The professors' account of the challenges they faced in drafting § 1367 gives some sense, I think, of why that statute has proved difficult to interpret: "More broadly, codifying a complex area like supplemental jurisdiction—as Professor Freer's discussion illustrates—is itself complex business. A danger is that the result of the effort to deal with all the foreseeables will be a statute too prolix and baroque for everyday use and application by practitioners and judges. Section 1367 reflects an effort to provide sufficient detail without overdoing it. The statute is concededly not perfect. What it accomplishes, however, is to change the direction taken by the Supreme Court in *Finley*, to provide basic guidance (in particular the legislative history's general approval of pre-*Finley* case law, which has treated some specific issues Professor Freer raises), and then to trust the federal courts under the changed direction to interpret the statute sensibly . . . ." 40 Emory L. J., at 961.

uation before us, there is little reason to fear that an unholy conspiracy of "unrepresentative committee members," *ante*, at 568, law professors, and "unelected staffers and lobbyists," *ibid.*, endeavored to torpedo Congress' attempt to overrule (without discussion) two longstanding features of this Court's diversity jurisprudence.

After nearly 20 pages of complicated analysis, which explores subtle doctrinal nuances and coins various neologisms, the Court announces that § 1367 could not reasonably be read another way. See *ante*, at 567. That conclusion is difficult to accept. Given JUSTICE GINSBURG's persuasive account of the statutory text and its jurisprudential backdrop, and given the uncommonly clear legislative history, I am confident that the majority's interpretation of § 1367 is mistaken. I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE BREYER join, dissenting.

These cases present the question whether Congress, by enacting 28 U. S. C. § 1367, overruled this Court's decisions in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589 (1939) (reaffirming the holding of *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39, 40 (1911)), and *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973). *Clark* held that, when federal-court jurisdiction is predicated on a specified amount in controversy, each plaintiff joined in the litigation must independently meet the jurisdictional amount requirement. *Zahn* confirmed that in class actions governed by Federal Rule of Civil Procedure 23(b)(3), "[e]ach [class member] . . . must satisfy the jurisdictional amount, and any [class member] who does not must be dismissed from the case." 414 U. S., at 301.

Section 1367, all agree, was designed to overturn this Court's decision in *Finley* v. *United States*, 490 U. S. 545 (1989). *Finley* concerned not diversity-of-citizenship jurisdiction (28 U. S. C. § 1332), but original federal-court jurisdiction in cases arising under federal law (28 U. S. C. § 1331).

The plaintiff in *Finley* sued the United States under the Federal Tort Claims Act (FTCA), 28 U. S. C. § 1346(b), to recover for the death of her husband and children in an airplane crash. She alleged that the Federal Aviation Administration's negligence contributed to the fatal accident. She later amended her complaint to add state-law tort claims against two other defendants, a municipality and a utility company. 490 U. S., at 546–547. No independent basis for federal subject-matter jurisdiction existed over the state-law claims. The plaintiff could not have brought her entire action in state court, because federal jurisdiction in FTCA actions is exclusive. § 1346(b). Hence, absent federal jurisdiction embracing the state-law claims, she would be obliged to pursue two discrete actions, one in federal court, the other in state court. This Court held, nevertheless, that the District Court lacked jurisdiction over the "pendent-party" state-law claims. *Id.*, at 555–556. In so holding, the Court stressed that Congress held the control rein. *Id.*, at 547–549. Congress could reverse the result in *Finley*, and permit pendent jurisdiction over state-law claims against additional defendants, if it so chose. *Id.*, at 556. Congress did so in § 1367.

What more § 1367 wrought is an issue on which courts of appeals have sharply divided. Compare *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F. 3d 928, 930 (CA7 1996) (§ 1367 "supersedes *Clark* and allows pendent-party jurisdiction when the additional parties have claims worth less than [the jurisdictional minimum]"), and *In re Abbott Labs.*, 51 F. 3d 524, 529 (CA5 1995) ("[U]nder § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives."), with *Meritcare Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F. 3d 214, 222 (CA3 1999) (§ 1367 "preserves the prohibition against aggregation outlined in *[Zahn* and *Clark]*"), and *Leonhardt* v. *Western Sugar Co.*, 160 F. 3d 631, 641 (CA10 1998) (§ 1367 does not alter "the historical rules prohibiting aggregation

of claims, including *Zahn*'s prohibition of such aggregation in diversity class actions"). The Court today holds that § 1367, although prompted by *Finley*, a case in which original access to federal court was predicated on a federal question, notably enlarges federal diversity jurisdiction. The Court reads § 1367 to overrule *Clark* and *Zahn*, thereby allowing access to federal court by coplaintiffs or class members who do not meet the now in excess of $75,000 amount-in-controversy requirement, so long as at least one coplaintiff, or the named class representative, has a jurisdictionally sufficient claim. *Ante*, at 549.

The Court adopts a plausibly broad reading of § 1367, a measure that is hardly a model of the careful drafter's art. There is another plausible reading, however, one less disruptive of our jurisprudence regarding supplemental jurisdiction. If one reads § 1367(a) to instruct, as the statute's text suggests, that the district court must first have "original jurisdiction" over a "civil action" before supplemental jurisdiction can attach, then *Clark* and *Zahn* are preserved, and supplemental jurisdiction does not open the way for joinder of plaintiffs, or inclusion of class members, who do not independently meet the amount-in-controversy requirement. For the reasons that follow, I conclude that this narrower construction is the better reading of § 1367.

I

A

Section 1367, captioned "Supplemental jurisdiction," codifies court-recognized doctrines formerly labeled "pendent" and "ancillary" jurisdiction. Pendent jurisdiction involved the enlargement of federal-question litigation to include related state-law claims. Ancillary jurisdiction evolved primarily to protect defending parties, or others whose rights might be adversely affected if they could not air their claims in an ongoing federal-court action. Given jurisdiction over the principal action, federal courts entertained certain mat-

ters deemed ancillary regardless of the citizenship of the parties or the amount in controversy.

Mine Workers v. *Gibbs*, 383 U. S. 715 (1966), the leading pendent jurisdiction case, involved a claim against a union for wrongfully inducing the plaintiff's discharge. The plaintiff stated a federal claim under the Taft-Hartley Act, and an allied state-law claim of unlawful conspiracy to interfere with his employment contract. This Court upheld the joinder of federal and state claims. "[T]here is *power* in federal courts to hear the whole," the Court said, when the state and federal claims "derive from a common nucleus of operative fact" and are so linked that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Id.*, at 725.

Gibbs involved the linkage of federal and state claims against the same defendant. In *Finley* v. *United States*, 490 U. S. 545, the Court contained *Gibbs*. Without congressional authorization, the Court admonished, the pendent jurisdiction umbrella could not be stretched to cover the joinder of additional parties. *Gibbs* had departed from earlier decisions recognizing that "jurisdiction [must] be explicitly conferred," the Court said. 490 U. S., at 556. *Aldinger* v. *Howard*, 427 U. S. 1 (1976), the Court observed, although resting "on a much narrower basis," R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 925 (5th ed. 2003) (hereinafter Hart & Wechsler), had already signaled that "the *Gibbs* approach would not be extended to the pendent-party field," *Finley*, 490 U. S., at 556. While the *Finley* Court did not "limit or impair" *Gibbs* itself, 490 U. S., at 556, for further development of pendent jurisdiction, the Court made it plain, the initiative would lie in Congress' domain, *id.*, at 555–556.[1]

[1] "[B]oth the Finley result and its implications" sparked "considerable criticism." Hart & Wechsler 926; see also 13B C. Wright, A. Miller, E. Cooper, & R. Freer, Federal Practice and Procedure § 3567.2, p. 91 (2d

Ancillary jurisdiction, which evolved as a more sprawling doctrine than pendent jurisdiction, was originally rooted in "the notion that [when] federal jurisdiction in [a] principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger*, 427 U. S., at 11; see, *e. g.*, *Freeman* v. *Howe*, 24 How. 450 (1861). In *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978), the Court addressed the permissible scope of the doctrine in relation to the liberal provisions of the Federal Rules of Civil Procedure for joinder of parties and claims.

Kroger commenced as a suit between a citizen of Iowa and a Nebraska corporation. When the Nebraska defendant impleaded an Iowa corporation as a third-party defendant under Rule 14(a), the plaintiff asserted state-law claims against the impleaded party. No independent basis of federal jurisdiction existed over the newly asserted claims, for both plaintiff and impleaded defendant were citizens of Iowa. 437 U. S., at 370. The Court held that the plaintiff could not draw in a co-citizen defendant in this manner. *Id.*, at 377. Federal courts, by the time of *Kroger*, were routinely exercising ancillary jurisdiction over compulsory counterclaims, impleader claims, cross-claims among defendants, and claims of parties who intervened "of right." See *id.*, at 375, n. 18 (collecting cases). In *Kroger*, however,

> "the nonfederal claim . . . was asserted by the plaintiff, who voluntarily chose to bring suit upon a state-law claim in a federal court. By contrast, ancillary jurisdiction typically involve[d] claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could

---

ed., Supp. 2005) (hereinafter Wright & Miller) (characterizing the *Finley* decision as "surprising").

assert them in an ongoing action in a federal court." *Id.*, at 376.

Having "chosen the federal rather than the state forum," the Court said, the plaintiff had to "accept its limitations." *Ibid.*

In sum, in federal-question cases before § 1367's enactment, the Court recognized pendent-claim jurisdiction, *Gibbs*, 383 U. S., at 725, but not pendent-party jurisdiction, *Finley*, 490 U. S., at 555–556. As to ancillary jurisdiction, the Court adhered to the limitation that in diversity cases, throughout the litigation, all plaintiffs must remain diverse from all defendants. See *Kroger*, 437 U. S., at 374.

Although pendent jurisdiction and ancillary jurisdiction evolved discretely,[2] the Court has recognized that they are "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?" *Id.*, at 370. *Finley* regarded that question as one properly addressed to Congress. See 490 U. S., at 549, 556; 13 Wright & Miller § 3523, p. 127 (2d ed., Supp. 2005); Hart & Wechsler 924–926.

B

Shortly before the Court decided *Finley*, Congress had established the Federal Courts Study Committee to take up issues relating to "the federal courts' congestion, delay, expense, and expansion." Judicial Conference of the United States, Report of the Federal Courts Study Committee 3 (Apr. 2, 1990) (hereinafter Committee Report). The Committee's charge was to conduct a study addressing the "crisis" in federal courts caused by the "rapidly growing" caseload. *Id.*, at 6 (internal quotation marks omitted).

---

[2] See generally 13B Wright & Miller §§ 3567, 3567.1, 3567.2 (2d ed. 1984) (discussing pendent jurisdiction); 13 *id.*, § 3523 (discussing ancillary jurisdiction); Hart & Wechsler 922–926 (discussing pendent jurisdiction); *id.*, at 1488–1490 (discussing ancillary jurisdiction).

Among recommendations, the Committee urged Congress to "authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base." *Id.*, at 47. If adopted, this recommendation would overrule *Finley*. Earlier, a Subcommittee had recommended that Congress overrule both *Finley* and *Zahn*. Report of the Subcommittee on the Role of the Federal Courts and Their Relationship to the States 547, 561, n. 33 (Mar. 12, 1990), reprinted in 1 Judicial Conference of the United States, Federal Courts Study Committee, Working Papers and Subcommittee Reports (July 1, 1990) (hereinafter Subcommittee Report). In the Subcommittee's view, "[f]rom a policy standpoint," *Zahn* "ma[de] little sense." Subcommittee Report, at 561, n. 33.[3] The full Committee, however, urged only the overruling of *Finley* and did not adopt the recommendation to overrule *Zahn*. Committee Report, at 47–48.

As a separate matter, a substantial majority of the Committee "strongly recommend[ed]" the elimination of diversity jurisdiction, save for "complex multi-state litigation, interpleader, and suits involving aliens." *Id.*, at 38–39; accord Subcommittee Report, at 454–458. "[N]o other step," the Committee's Report maintained, "will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary." Committee Report, at 39.

Congress responded by adopting, as part of the Judicial Improvements Act of 1990, 104 Stat. 5089,[4] recommendations

---

[3] Anomalously, in holding that each class member "must satisfy the jurisdictional amount," *Zahn* v. *International Paper Co.*, 414 U. S. 291, 301 (1973), the *Zahn* Court did not refer to *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 366 (1921), which established that in a class action, the citizenship of the named plaintiff is controlling. But see *Zahn*, 414 U. S., at 309–310 (Brennan, J., dissenting) (urging *Zahn*'s inconsistency with *Ben-Hur*).

[4] The omnibus Act encompassed the Civil Justice Reform Act of 1990 (Title I), the creation of new judgeships (Title II), the Federal Courts Study Committee Implementation Act of 1990 (Title III), and the estab-

of the Federal Courts Study Committee ranked by the House Committee on the Judiciary as "modest" and "noncontroversial." H. R. Rep. No. 101–734, pp. 15–16 (1990) (hereinafter H. R. Rep.); see also 136 Cong. Rec. 36288 (1990). Congress did not take up the Study Committee's immodest proposal to curtail diversity jurisdiction. It did, however, enact a supplemental jurisdiction statute, codified as 28 U. S. C. § 1367.

II

A

Section 1367, by its terms, operates only in civil actions "of which the district courts have original jurisdiction." The "original jurisdiction" relevant here is diversity-of-citizenship jurisdiction, conferred by § 1332. The character of that jurisdiction is the essential backdrop for comprehension of § 1367.

The Constitution broadly provides for federal-court jurisdiction in controversies "between Citizens of different States." Art. III, § 2, cl. 1. This Court has read that provision to demand no more than "minimal diversity," *i. e.*, so long as one party on the plaintiffs' side and one party on the defendants' side are of diverse citizenship, Congress may authorize federal courts to exercise diversity jurisdiction. See *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531 (1967). Further, the Constitution includes no amount-in-controversy limitation on the exercise of federal jurisdiction. But from the start, Congress, as its measures have been construed by this Court, has limited federal-court exercise of diversity jurisdiction in two principal ways. First, unless Congress specifies otherwise, diversity must be "complete," *i. e.*, all parties on plaintiffs' side must be diverse from all parties on defendants' side. *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806); see 13B Wright & Miller § 3605 (2d ed.

---

lishment of the National Commission on Judicial Discipline and Removal (Title IV).

1984). Second, each plaintiff's stake must independently meet the amount-in-controversy specification: "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount." *Troy Bank*, 222 U. S., at 40.

The statute today governing federal-court exercise of diversity jurisdiction in the generality of cases, § 1332, like all its predecessors, incorporates both a diverse-citizenship requirement and an amount-in-controversy specification.[5] As to the latter, the statute reads: "The district courts shall have original jurisdiction [in diversity-of-citizenship cases] where the matter in controversy exceeds the sum . . . of $75,000." § 1332(a). This Court has long held that, in determining whether the amount-in-controversy requirement has been satisfied, a single plaintiff may aggregate two or more claims against a single defendant, even if the claims are unrelated. See, *e. g.*, *Edwards* v. *Bates County*, 163 U. S. 269, 273 (1896). But in multiparty cases, including class actions, we have unyieldingly adhered to the nonaggregation

---

[5] Endeavoring to preserve the "complete diversity" rule first stated in *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806), the Court's opinion drives a wedge between the two components of 28 U. S. C. § 1332, treating the diversity-of-citizenship requirement as essential, the amount-in-controversy requirement as more readily disposable. See *ante*, at 553, 562. Section 1332 itself, however, does not rank order the two requirements. What "[o]rdinary princip[e] of statutory construction" or "sound canon of interpretation," *ante*, at 558, allows the Court to slice up § 1332 this way? In partial explanation, the Court asserts that amount in controversy can be analyzed claim by claim, but the diversity requirement cannot. See *ante*, at 554. It is not altogether clear why that should be so. The cure for improper joinder of a nondiverse party is the same as the cure for improper joinder of a plaintiff who does not satisfy the jurisdictional amount. In both cases, original jurisdiction can be preserved by dismissing the nonqualifying party. See *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 64 (1996) (diversity); *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 836–838 (1989) (same); *Zahn*, 414 U. S., at 295, 300 (amount in controversy); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 590 (1939) (same).

rule stated in *Troy Bank*. See *Clark*, 306 U. S., at 589 (reaffirming the "familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements"); *Snyder* v. *Harris*, 394 U. S. 332, 339–340 (1969) (abandonment of the nonaggregation rule in class actions would undercut the congressional "purpose . . . to check, to some degree, the rising caseload of the federal courts").

This Court most recently addressed "[t]he meaning of [§ 1332's] 'matter in controversy' language" in *Zahn*, 414 U. S., at 298. *Zahn*, like *Snyder* decided four years earlier, was a class action. In *Snyder*, no class member had a claim large enough to satisfy the jurisdictional amount. But in *Zahn*, the named plaintiffs had such claims. 414 U. S., at 292. Nevertheless, the Court declined to depart from its "longstanding construction of the 'matter in controversy' requirement of § 1332." *Id.*, at 301. The *Zahn* Court stated:

> "*Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional-amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims [meets the amount-in-controversy requirement] but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." *Id.*, at 300.

The rule that each plaintiff must independently satisfy the amount-in-controversy requirement, unless Congress expressly orders otherwise, was thus the solidly established

reading of § 1332 when Congress enacted the Judicial Improvements Act of 1990, which added § 1367 to Title 28.

B

These cases present the question whether Congress abrogated the nonaggregation rule long tied to § 1332 when it enacted § 1367. In answering that question, "context [should provide] a crucial guide." *Rosario Ortega* v. *Star-Kist Foods, Inc.*, 370 F. 3d 124, 135 (CA1 2004). The Court should assume, as it ordinarily does, that Congress legislated against a background of law already in place and the historical development of that law. See *National Archives and Records Admin.* v. *Favish*, 541 U. S. 157, 169 (2004). Here, that background is the statutory grant of diversity jurisdiction, the amount-in-controversy condition that Congress, from the start, has tied to the grant, and the nonaggregation rule this Court has long applied to the determination of the "matter in controversy."

Section 1367(a) provides:

> "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

The Court is unanimous in reading § 1367(a) to permit pendent-party jurisdiction in federal-question cases, and thus, to overrule *Finley*. The basic jurisdictional grant, § 1331, provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution,

laws, or treaties of the United States." Since 1980, § 1331 has contained no amount-in-controversy requirement. See 94 Stat. 2369 (eliminating § 1331's amount-in-controversy requirement). Once there is a civil action presenting a qualifying claim arising under federal law, § 1331's sole requirement is met. District courts, we have held, may then adjudicate, additionally, state-law claims "deriv[ing] from a common nucleus of operative fact." *Gibbs*, 383 U. S., at 725. Section 1367(a) enlarges that category to include not only state-law claims against the defendant named in the federal claim, but also "[state-law] claims that involve the joinder or intervention of additional parties."[6]

The Court divides, however, on the impact of § 1367(a) on diversity cases controlled by § 1332. Under the majority's reading, § 1367(a) permits the joinder of related claims cut loose from the nonaggregation rule that has long attended actions under § 1332. Only the claims specified in § 1367(b)[7] would be excluded from § 1367(a)'s expansion of § 1332's grant

---

[6] The Court noted in *Zahn*, 414 U. S., at 302, n. 11, that when the exercise of § 1331 federal-question jurisdiction and § 1332 diversity jurisdiction were conditioned on the same jurisdictional-amount limitation, the same nonaggregation rule applied under both heads of federal jurisdiction. But cf. *ante*, at 562. The Court added, however, that "Congress ha[d] exempted major areas of federal-question jurisdiction from any jurisdictional-amount requirements," thus diminishing the impact of § 1331's "matter in controversy" specification in cases arising under federal law. *Zahn*, 414 U. S., at 302, n. 11.

[7] Title 28 U. S. C. § 1367(b) provides:

"In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

of diversity jurisdiction. And because § 1367(b) contains no exception for joinder of plaintiffs under Rule 20 or class actions under Rule 23, the Court concludes, *Clark* and *Zahn* have been overruled.[8]

The Court's reading is surely plausible, especially if one detaches § 1367(a) from its context and attempts no reconciliation with prior interpretations of § 1332's amount-in-controversy requirement. But § 1367(a)'s text, as the First Circuit held, can be read another way, one that would involve no rejection of *Clark* and *Zahn*.

As explained by the First Circuit in *Ortega*, and applied to class actions by the Tenth Circuit in *Leonhardt*, see *supra*, at 578–579, § 1367(a) addresses "civil action[s] of which the district courts have original jurisdiction," a formulation that, in diversity cases, is sensibly read to incorporate the rules on joinder and aggregation tightly tied to § 1332 at the time of § 1367's enactment. On this reading, a complaint must first meet that "original jurisdiction" measurement. If it does not, no supplemental jurisdiction is authorized. If it does, § 1367(a) authorizes "supplemental jurisdiction" over related claims. In other words, § 1367(a) would preserve undiminished, as part and parcel of § 1332 "original jurisdiction" determinations, both the "complete diversity" rule and

---

[8] Under the Court's construction of § 1367, see *ante*, at 560, 566–567, Beatriz Ortega's family members can remain in the action because their joinder is merely permissive, see Fed. Rule Civ. Proc. 20. If, however, their presence was "needed for just adjudication," Rule 19, their dismissal would be required. The inclusion of those who may join, and exclusion of those who should or must join, defies rational explanation, but cf. *ante*, at 565, and others adopting the interpretation the Court embraces have so acknowledged, see *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F. 3d 928, 932 (CA7 1996) (recognizing the anomaly and inquiring: "What sense can this make?"); cf. 14B Wright & Miller § 3704, p. 168 (3d ed. 1998) (distinction between Rule 19 and Rule 20 "seems incongruous, and serves no apparent public policy purpose").

the decisions restricting aggregation to arrive at the amount in controversy.[9] Section 1367(b)'s office, then, would be "to prevent the erosion of the complete diversity [and amount-in-controversy] requirement[s] that might otherwise result from an expansive application of what was once termed the doctrine of ancillary jurisdiction." See Pfander, Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism, 148 U. Pa. L. Rev. 109, 114 (1999); *infra*, at 593–594. In contrast to the Court's construction of § 1367, which draws a sharp line between the diversity and amount-in-controversy components of § 1332, see *ante*, at 554; *supra*, at 585, n. 5, the interpretation presented here does not sever the two jurisdictional requirements.

The more restrained reading of § 1367 just outlined would yield affirmance of the First Circuit's judgment in *Ortega*, and reversal of the Eleventh Circuit's judgment in *Exxon*. It would not discard entirely, as the Court does, the judicially developed doctrines of pendent and ancillary jurisdiction as they existed when *Finley* was decided.[10] Instead, it would recognize § 1367 essentially as a codification of those doctrines, placing them under a single heading, but largely retaining their substance, with overriding *Finley* the only basic change: Supplemental jurisdiction, once the district court has original jurisdiction, would now include "claims that involve the joinder or intervention of additional parties." § 1367(a).

Pendent jurisdiction, as earlier explained, see *supra*, at 579–580, applied only in federal-question cases and allowed

---

[9] On this reading of § 1367(a), it is immaterial that § 1367(b) "does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here." *Ante*, at 560. Because those claims would not come within § 1367(a) in the first place, Congress would have had no reason to list them in § 1367(b). See *infra*, at 592–593.

[10] The Court's opinion blends the two doctrines, according no significance to their discrete development. See *ante*, at 552–557.

plaintiffs to attach nonfederal claims to their jurisdiction-qualifying claims. Ancillary jurisdiction applied primarily, although not exclusively, in diversity cases and "typically involve[d] claims *by a defending party* haled into court against his will." *Kroger*, 437 U. S., at 376 (emphasis added); see also *id.*, at 375, n. 18; *supra*, at 581–582. As the First Circuit observed, neither doctrine permitted a plaintiff to circumvent the dual requirements of § 1332 (diversity of citizenship and amount in controversy) "simply by joining her [jurisdictionally inadequate] claim in an action brought by [a] jurisdictionally competent diversity plaintiff." *Ortega*, 370 F. 3d, at 138.

Not only would the reading I find persuasive "alig[n] statutory supplemental jurisdiction with the judicially developed doctrines of pendent and ancillary jurisdiction," *ibid.*, it would also synchronize § 1367 with the removal statute, 28 U. S. C. § 1441. As the First Circuit carefully explained:

> "Section 1441, like § 1367, applies only if the 'civil action' in question is one 'of which the district courts . . . have original jurisdiction.' § 1441(a). Relying on that language, the Supreme Court has interpreted § 1441 to prohibit removal unless the entire action, as it stands at the time of removal, could have been filed in federal court in the first instance. *See, e. g., Syngenta Crop Protection, Inc. v. Henson*, 537 U. S. 28, 33 (2002); *Okla. Tax Comm'n v. Graham*, 489 U. S. 838, 840 (1989) (per curiam). Section 1441 has thus been held to incorporate the well-pleaded complaint rule, *see City of Chicago* [v. *International College of Surgeons*, 522 U. S. 156, 163 (1997)];[11] the complete diversity rule, *see Caterpillar*,

[11] The point of the Court's extended discussion of *Chicago* v. *International College of Surgeons*, 522 U. S. 156 (1997), in the instant cases, see *ante*, at 562–564, slips from my grasp. There was no disagreement in that case, and there is none now, that 28 U. S. C. § 1367(a) is properly read to authorize the exercise of supplemental jurisdiction in removed

> *Inc. v. Lewis*, 519 U. S. 61, 73 (1996); and rules for calculating the amount in controversy, *see St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U. S. 283, 291–292 (1938)." 370 F. 3d, at 138 (citations omitted and footnote added).

The less disruptive view I take of § 1367 also accounts for the omission of Rule 20 plaintiffs and Rule 23 class actions in § 1367(b)'s text. If one reads § 1367(a) as a plenary grant of supplemental jurisdiction to federal courts sitting in diversity, one would indeed look for exceptions in § 1367(b). Finding none for permissive joinder of parties or class actions, one would conclude that Congress effectively, even if unintentionally, overruled *Clark* and *Zahn*. But if one recognizes that the nonaggregation rule delineated in *Clark* and *Zahn* forms part of the determination whether "original jurisdiction" exists in a diversity case, see *supra*, at 590, then plaintiffs who do not meet the amount-in-controversy requirement would fail at the § 1367(a) threshold. Congress would have no reason to resort to a § 1367(b) exception to turn such plaintiffs away from federal court, given that their claims, from the start, would fall outside the court's § 1332 jurisdiction. See Pfander, *supra*, at 148.

Nor does the more moderate reading assign different meanings to "original jurisdiction" in diversity and federal-question cases. See *ante*, at 561. As the First Circuit stated:

> " '[O]riginal jurisdiction' in § 1367(a) has the same meaning in every case: [An] underlying statutory grant of original jurisdiction must be satisfied. What differs be-

---

cases. *International College of Surgeons* was unusual in that the federal court there was asked to review a decision of a local administrative agency. Such review, it was unsuccessfully argued, was "appellate" in character, and therefore outside the ken of a court empowered to exercise "original" jurisdiction. Compare 522 U. S., at 166–168, with *id.*, at 176–177 (GINSBURG, J., dissenting).

> tween federal question and diversity cases is not the meaning of 'original jurisdiction' but rather the [discrete] requirements of sections 1331 and 1332. Under § 1331, the sole issue is whether a federal question appears on the face of the plaintiff's well-pleaded complaint; the [citizenship] of the parties and the amounts they stand to recover [do not bear on that determination]. Section 1332, by contrast, predicates original jurisdiction on the identity of the parties (*i. e.*, [their] complete diversity) and their [satisfaction of the amount-in-controversy specification]. [In short,] the 'original jurisdiction' language in § 1367 operates differently in federal-question and diversity cases not because the meaning of that term varies, but because the [jurisdiction-granting] statutes are different." 370 F. 3d, at 139–140.

What is the utility of § 1367(b) under my reading of § 1367(a)? Section 1367(a) allows parties other than the plaintiff to assert *reactive* claims once entertained under the heading ancillary jurisdiction. See *supra*, at 581 (listing claims, including compulsory counterclaims and impleader claims, over which federal courts routinely exercised ancillary jurisdiction). As earlier observed, see *supra*, at 590–591, § 1367(b) stops plaintiffs from circumventing § 1332's jurisdictional requirements by using another's claim as a hook to add a claim that the plaintiff could not have brought in the first instance. *Kroger* is the paradigm case. See *supra*, at 581–582. There, the Court held that ancillary jurisdiction did not extend to a plaintiff's claim against a nondiverse party who had been impleaded by the defendant under Rule 14. Section 1367(b), then, is corroborative of § 1367(a)'s coverage of claims formerly called ancillary, but provides exceptions to ensure that accommodation of added claims would not fundamentally alter "the jurisdictional requirements of section 1332." See Pfander, 148 U. Pa. L. Rev., at 135–137.

While § 1367's enigmatic text[12] defies flawless interpretation, see *supra*, at 589, n. 8,[13] the precedent-preservative reading, I am persuaded, better accords with the historical and legal context of Congress' enactment of the supplemental jurisdiction statute, see *supra*, at 582–584, 587, and the established limits on pendent and ancillary jurisdiction, see *supra*, at 580–582. It does not attribute to Congress a jurisdictional enlargement broader than the one to which the legislators adverted, cf. *Finley*, 490 U. S., at 549, and it follows the sound counsel that "close questions of [statutory] construction should be resolved in favor of continuity and

---

[12] The Court notes the passage this year of the Class Action Fairness Act (CAFA), Pub. L. 109–2, 119 Stat. 4, *ante*, at 571–572, only to dismiss that legislation as irrelevant. Subject to several exceptions and qualifications, CAFA provides for federal-court adjudication of state-law-based class actions in which diversity is "minimal" (one plaintiff's diversity from one defendant suffices), and the "matter in controversy" is an aggregate amount in excess of $5,000,000. Significant here, CAFA's enlargement of federal-court diversity jurisdiction was accomplished, "clearly and conspicuously," by amending § 1332. Cf. *Rosario Ortega* v. *Star-Kist Foods, Inc.*, 370 F. 3d 124, 142 (CA1 2004).

[13] If § 1367(a) itself renders unnecessary the listing of Rule 20 plaintiffs and Rule 23 class actions in § 1367(b), see *supra*, at 592, then it is similarly unnecessary to refer, as § 1367(b) does, to "persons proposed to be joined as plaintiffs under Rule 19." On one account, Congress bracketed such persons with persons "seeking to intervene as plaintiffs under Rule 24" to modify pre-§ 1367 practice. Before enactment of § 1367, courts entertained, under the heading ancillary jurisdiction, claims of Rule 24(a) intervenors "of right," see *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 375, n. 18 (1978), but denied ancillary jurisdiction over claims of "necessary" Rule 19 plaintiffs, see 13 Wright & Miller § 3523, p. 127 (2d ed., Supp. 2005). Congress may have sought simply to underscore that those seeking to join as plaintiffs, whether under Rule 19 or Rule 24, should be treated alike, *i. e.*, denied joinder when "inconsistent with the jurisdictional requirements of section 1332." See 370 F. 3d, at 140, and n. 15 (internal quotation marks omitted); H. R. Rep., at 29 ("Subsection (b) makes one small change in pre-*Finley* practice," *i. e.*, it eliminates the Rule 19/Rule 24 anomaly.).

against change," Shapiro, Continuity and Change in Statutory Interpretation, 67 N. Y. U. L. Rev. 921, 925 (1992).[14]

* * *

For the reasons stated, I would hold that § 1367 does not overrule *Clark* and *Zahn*. I would therefore affirm the judgment of the Court of Appeals for the First Circuit and reverse the judgment of the Court of Appeals for the Eleventh Circuit.

[14] While the interpretation of § 1367 described in this opinion does not rely on the measure's legislative history, that history, as JUSTICE STEVENS has shown, see *ante*, at 573 (dissenting opinion), is corroborative of the statutory reading set out above.

Syllabus

ORFF ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1566. Argued February 23, 2005—Decided June 23, 2005

Petitioner California farmers and farming entities purchase water from respondent Westlands Water District, which receives its water from the United States Bureau of Reclamation under a 1963 contract between Westlands and the Bureau. In 1993, Westlands and other water districts sued the Bureau for reducing their water supply. Petitioners, though not parties to the 1963 contract, intervened as plaintiffs. After negotiations, all parties except petitioners stipulated to dismissal of the districts' complaint. Petitioners pressed forward with, as relevant here, the claim that the United States had breached the contract. They contended that they were third-party beneficiaries entitled to enforce the contract and that the United States had waived its sovereign immunity from breach of contract suits in a provision of the Reclamation Reform Act of 1982, 43 U. S. C. § 390uu. The District Court ultimately held that petitioners were neither contracting parties nor intended third-party beneficiaries of the contract and therefore could not benefit from § 390uu's waiver. The Ninth Circuit affirmed in relevant part.

Held: Section 390uu does not waive the United States' sovereign immunity from petitioners' suit. The provision grants consent "to *join* the United States *as a necessary party defendant* in any suit to adjudicate" certain rights under a federal reclamation contract. (Emphasis added.) A waiver of sovereign immunity must be strictly construed in favor of the sovereign. See, *e. g.*, *Department of Army* v. *Blue Fox, Inc.*, 525 U. S. 255, 261. In light of this principle, § 390uu is best interpreted to grant consent to join the United States in an action between other parties when the action requires construction of a reclamation contract and joinder of the United States is necessary. It does not permit a plaintiff to sue the United States alone.

This interpretation draws support from § 390uu's use of the words "necessary party," a term of art whose meaning calls to mind Federal Rule of Civil Procedure 19(a)'s requirements for joinder of parties. The interpretation also draws support from the contrast between § 390uu's language, which speaks in terms of joinder, and the broader phrasing of other statutes, *e. g.*, the Tucker Act, that waive immunity from suits against the United States alone. Petitioners' suit, brought solely

against the United States and its agents, is not an attempt to "join the United States as a necessary party defendant" under § 390uu. Pp. 601–604.

358 F. 3d 1137, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.

William M. Smiland argued the cause for petitioners. With him on the briefs were *Theodore A. Chester, Jr.*, and *Hal S. Scott.*

Jeffrey P. Minear argued the cause for respondent United States. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Sansonetti, Deputy Solicitor General Kneedler,* and *Todd S. Aagaard.*

Stuart L. Somach argued the cause for respondent Westlands Water District. With him on the brief were *Andrew M. Hitchings, Robert B. Hoffman, Daniel J. O'Hanlon, William T. Chisum,* and *Donald B. Ayer. Michael Rubin, Linda Lye, Hamilton Candee,* and *Michael E. Wall* filed a brief for Intervenors-Respondents Natural Resources Defense Council et al.*

JUSTICE THOMAS delivered the opinion of the Court.

Petitioners are individual farmers and farming entities in California who purchase water from respondent Westlands Water District (Westlands or District). Westlands receives its water from the United States Bureau of Reclamation (Bu-

**Nancie G. Marzulla* and *Roger J. Marzulla* filed a brief for the Central San Joaquin Water Conservation District et al. as *amici curiae* urging reversal.

Marvin S. Cohen, Paul R. Orme, and *W. Patrick Schiffer* filed a brief for the Central Arizona Water Conservation District et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of California by *Bill Lockyer,* Attorney General of California, *Tom Greene,* Chief Assistant Attorney General, *Mary E. Hackenbracht,* Senior Assistant Attorney General, and *William Jenkins,* Deputy Attorney General; and for the Pacific Legal Foundation et al. by *Russell C. Brooks* and *Robin L. Rivett.*

reau) under a 1963 contract between Westlands and the Bureau. Petitioners contend that the Bureau breached the contract in 1993 when it reduced the water supply to Westlands. Although petitioners are not parties to the contract, they claim that they are entitled to enforce it as intended third-party beneficiaries; that the United States waived its sovereign immunity from suits for breach of contract in a provision of the Reclamation Reform Act of 1982, § 221, 96 Stat. 1271, 43 U. S. C. § 390uu; and hence that they may sue the United States in federal district court for breach of the 1963 contract. We conclude that, in enacting § 390uu, Congress did not consent to petitioners' suit.

I

The Reclamation Act of 1902 set in motion a massive program to provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid lands in many Western States. *California* v. *United States*, 438 U. S. 645, 650 (1978). The California Central Valley Project (CVP), a system of dams, reservoirs, levees, canals, pumping stations, hydropower plants, and other infrastructure, distributes water throughout California's vast Central Valley. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 733 (1950).

The Bureau, located in the Department of the Interior, administers the CVP. In accordance with its standard practice for federal reclamation projects, the Bureau holds permits to appropriate water from the relevant state agency, here the California State Water Resources Control Board. See *California*, *supra*, at 652, and n. 7. The Bureau distributes the water in accordance with its statutory and contractual obligations. It contracts with state irrigation districts to deliver water and to receive reimbursement for the costs of constructing, operating, and maintaining the works.

In 1963, the United States agreed to a 40-year water service contract with Westlands, a political subdivision of the

State of California. The 1963 contract provided, among other things, that the United States would furnish to the District specified annual quantities of water, App. 34–36, and that the District would accept and pay for the water at a maximum rate of $8 per acre-foot, *id.*, at 38. Since 1978, the contract has generated extensive litigation. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 899 F. 2d 814, 817 (CA9 1990); *O'Neill* v. *United States*, 50 F. 3d 677, 681 (CA9 1995); 358 F. 3d 1137, 1141 (CA9 2004) (case below). In 1982, Congress enacted the Reclamation Reform Act, which included 43 U. S. C. § 390uu, the waiver of sovereign immunity at issue here.

The present case arose from water delivery reductions in the early 1990's. Those reductions stemmed from environmental obligations imposed on the Bureau by the 1992 enactment of the Central Valley Project Improvement Act (CVPIA), 106 Stat. 4706. The CVPIA directed the Secretary of the Interior to "operate the [CVP] to meet all obligations under . . . the Federal Endangered Species Act" (ESA), § 3406(b), and to dedicate annually a certain amount of CVP water to implement fish, wildlife, and habitat restoration, § 3406(b)(2). In the early 1990's, the National Marine Fisheries Service listed the Sacramento River winter-run chinook salmon as a threatened species under the ESA, see 55 Fed. Reg. 46523 (1990); 50 CFR § 227.4(e) (1991); and, in 1993, the United States Fish and Wildlife Service listed the delta smelt as a threatened species, see 58 Fed. Reg. 12854–12855; 50 CFR § 17.11. The Bureau concluded that pumps used to deliver water south of the Sacramento-San Joaquin Delta could harm these species. Brief for United States 10–11, and n. 7. To avert possible harm to these species and other wildlife, the Bureau concluded that it needed to reduce the water delivery. In the 1993–1994 water year, the Bureau reduced by 50 percent the contractual delivery of CVP water to water districts south of the Delta, including Westlands. *Id.*, at 10; see also *O'Neill*, *supra*, at 681.

In 1993, Westlands and several other water districts challenged the Bureau's 50-percent delivery reduction under the Administrative Procedure Act, the ESA, the National Environmental Policy Act of 1969, and the Due Process and Takings Clauses of the Fifth Amendment. *Westlands Water Dist.* v. *United States Dept. of Interior, Bureau of Reclamation*, 850 F. Supp. 1388, 1394–1395 (ED Cal. 1994). Petitioner landowners and water users intervened as plaintiffs. Respondent Natural Resources Defense Council and other fishing and conservation organizations intervened as defendants. *Id.*, at 1394. Ultimately, following negotiations among the State of California, the Federal Government, and urban, agricultural, and environmental interests, the water districts and all parties except petitioners stipulated to the dismissal of the districts' complaint. 358 F. 3d, at 1142; App. to Pet. for Cert. 25a; Brief for United States 11.[1]

Petitioners pressed forward with numerous claims. The District Court dismissed some of them and granted summary judgment for the Government on others, see 358 F. 3d, at 1142, leaving only the claim at issue here: that the United States had breached the 1963 contract by reducing the delivery of water and was liable for money damages. Petitioners contended that the United States had waived its sovereign immunity from their suit in the Reclamation Reform Act, 43 U. S. C. § 390uu. The District Court initially held that petitioners were intended third-party beneficiaries and that the language of § 390uu was broad enough to allow their suit, App. to Pet. for Cert. 26a, but on reconsideration changed its view. It held that, in light of intervening Circuit authority, *Klamath Water Users Protective Assn.* v. *Patterson*, 204 F. 3d 1206 (CA9 1999), petitioners were neither contracting parties nor intended third-party beneficiaries of the 1963 contract, and therefore could not benefit from § 390uu's waiver. App. to Pet. for Cert. 27a–34a.

---

[1] Westlands subsequently intervened on appeal.

The Court of Appeals affirmed in relevant part. It agreed with the District Court's reading of the 1963 contract and § 390uu in light of *Klamath*. 358 F. 3d, at 1144–1147. The Court of Appeals noted that its decision might be at odds with *H. F. Allen Orchards* v. *United States*, 749 F. 2d 1571 (CA Fed. 1984), which had reached the opposite conclusion with respect to farmers who belonged to an irrigation district in Washington. 358 F. 3d, at 1147, n. 5. We granted certiorari. 543 U. S. 924 (2004).

II

This dispute centers on § 390uu, which waives the United States' sovereign immunity for certain purposes. Section 390uu provides:

> "Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated."

Petitioners contend that they are intended third-party beneficiaries of the 1963 contract and therefore entitled to enforce the contract. Hence, they claim, their suit is one "to adjudicate . . . the contractual rights of a contracting entity and the United States" within the meaning of § 390uu. This argument founders on the principle that a waiver of sover-

eign immunity must be strictly construed in favor of the sovereign. See, *e. g.*, *Department of Army* v. *Blue Fox, Inc.*, 525 U. S. 255, 261 (1999); *Lane* v. *Peña*, 518 U. S. 187, 192 (1996). Construing § 390uu in light of this principle, we find it insufficient to waive sovereign immunity.

Section 390uu grants consent "to *join* the United States *as a necessary party defendant* in any suit to adjudicate" certain rights under a federal reclamation contract. (Emphasis added.) This language is best interpreted to grant consent to join the United States in an action between other parties—for example, two water districts, or a water district and its members—when the action requires construction of a reclamation contract and joinder of the United States is necessary. It does not permit a plaintiff to sue the United States alone.

Section 390uu's use of the words "necessary party" supports this interpretation. Before 1966, the term "necessary" described the class of parties now called "Persons to be Joined if Feasible" under Federal Rule of Civil Procedure 19(a). See *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 116–118, and n. 12 (1968) (recounting terminology change). Rule 19(a) requires a court to order joinder of a party if

> "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Though the Rule no longer describes such parties as "necessary," "necessary party" is a term of art whose meaning par-

allels Rule 19(a)'s requirements. See Black's Law Dictionary 928 (5th ed. 1979) (defining "necessary parties" as "those persons who must be joined in an action because, *inter alia*, complete relief cannot be given to those already parties without their joinder," and citing Fed. Rule Civ. Proc. 19(a)).

The phrase "join . . . as a necessary party defendant" in § 390uu thus calls to mind Rule 19(a)'s requirements. We need not decide here whether the phrase limits the waiver of sovereign immunity to cases in which the United States could be joined under Rule 19(a). Regardless, the traditional concept of joinder of a necessary party supports interpreting § 390uu to permit joinder of the United States in an action rather than initiation of a suit solely against it.

Our conclusion draws force from the contrast between § 390uu's language, which speaks in terms of joinder, and the broader phrasing of statutes that waive immunity from suits against the United States alone. For example, the Tucker Act grants the United States Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U. S. C. § 1491(a)(1).[2] The Little Tucker Act grants district courts original jurisdiction, concurrent with the Court of Federal Claims, over "[a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States." § 1346(a)(2). The contrast between 43 U. S. C. § 390uu and the broader language of these statutes confirms that our construction ascribes the proper meaning to the limiting phrase "join . . . as a necessary party defendant" in § 390uu.

Petitioners' suit cannot proceed under our interpretation of § 390uu. For purposes of that provision, petitioners sought to sue the United States alone: They named as de-

[2] The District Court invited petitioners several times to transfer their damages claims to the Court of Federal Claims, but petitioners did not accept those invitations. App. to Pet. for Cert. 22a.

fendants the United States itself, as well as various federal entities and officials they viewed as responsible for the water delivery reduction (for example, the Bureau, the Fish and Wildlife Service, and the Secretary of the Interior). Petitioners' suit, brought solely against the United States and its agents, is not an attempt to "*join* the United States as a necessary party defendant." § 390uu (emphasis added).[3]

* * *

We hold that § 390uu does not waive immunity from petitioners' suit: The statute does not waive immunity from suits directly against the United States, as opposed to joinder of the United States as a necessary party defendant to permit a complete adjudication of rights under a reclamation contract. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

---

[3] We need not reach the contentions, advanced by respondents, that § 390uu neither unequivocally grants consent to a money damages remedy, Brief for United States 23–25; Brief for Natural Resources Defense Council et al. 20–21, nor unequivocally grants consent to suit by noncontracting entities, *id.*, at 22–23, and n. 8; Brief for Westlands Water District 44–46. As explained above, we find § 390uu otherwise insufficiently clear to grant consent to petitioners' suit.

Syllabus

HALBERT *v.* MICHIGAN

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 03–10198. Argued April 25, 2005—Decided June 23, 2005

In *Douglas* v. *California*, 372 U. S. 353, this Court held that, in criminal proceedings, a State must provide counsel for an indigent defendant in a first appeal as of right. Two considerations were key: (1) An appeal "of right" yields an adjudication on the "merits," *id.*, at 357, and (2) first-tier review differs from subsequent appellate stages "at which the claims have once been presented by a lawyer and passed upon by an appellate court," *id.*, at 356. Later, in *Ross* v. *Moffitt*, 417 U. S. 600, the Court held that a State need not appoint counsel to aid a poor person seeking to pursue a second-tier discretionary appeal to the State's highest court, or, thereafter, certiorari review in this Court. *Id.*, at 610–612, 615–618. The *Douglas* rationale does not extend to second-tier discretionary review, the Court explained, because, at that stage, error correction is not the reviewing court's prime function. 417 U. S., at 615. Principal criteria for state high court review, *Ross* noted, include whether the issues presented are of significant public interest, whether the cause involves legal principles of major significance to the State's jurisprudence, and whether the decision below is in probable conflict with the high court's precedent. *Ibid.* Further, a defendant who has received counsel's aid in a first-tier appeal as of right would be armed with a transcript or other record of trial proceedings, a brief in the appeals court setting forth his claims, and, often, that court's opinion disposing of the case. *Ibid.*

Michigan has a two-tier appellate system. The State Supreme Court hears appeals by leave only. The intermediate Court of Appeals adjudicates appeals as of right from criminal convictions, except that a defendant convicted on a guilty or *nolo contendere* plea who seeks intermediate appellate court review must apply for leave to appeal. Under Michigan law, most indigent defendants convicted on a plea must proceed *pro se* in seeking leave to appeal to the intermediate court. In *People* v. *Bulger*, the Michigan Supreme Court held that the Fourteenth Amendment's Equal Protection and Due Process Clauses do not secure a right to appointed counsel for plea-convicted defendants seeking review in the intermediate appellate court for these reasons: Such review is discretionary; plea proceedings are shorter, simpler, and more routine than trials; and a defendant entering a plea accedes to the State's fundamental interest in finality.

Syllabus

Petitioner Halbert pleaded *nolo contendere* to two counts of criminal sexual conduct. During Halbert's plea colloquy, the trial court advised him of instances in which it "must" or "may" appoint appellate counsel, but failed to tell him that it could not appoint counsel in any other circumstances, including Halbert's own case. The day after his sentence was imposed, Halbert moved to withdraw his plea. Denying the motion, the trial court stated that Halbert's proper remedy was to appeal to the State Court of Appeals. Twice thereafter, Halbert asked the trial court to appoint counsel to help him prepare an application for leave to appeal to the intermediate court, stating that his sentence had been misscored, that he needed counsel to preserve the issue before undertaking an appeal, that he had learning disabilities and was mentally impaired, and that he had been obliged to rely on fellow inmates in preparing his *pro se* filings. The court denied Halbert's motion, citing *Bulger*. Halbert then filed a *pro se* application for leave to appeal, asserting sentencing error and ineffective assistance of counsel and seeking, *inter alia*, remand for appointment of appellate counsel. The Court of Appeals denied leave "for lack of merit in the grounds presented." The Michigan Supreme Court declined review.

Held: The Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals. Pp. 616–624.

Two aspects of the Michigan Court of Appeals' process following plea-based convictions compel the conclusion that *Douglas*, not *Ross*, controls here. First, in ruling on an application for leave to appeal, that court looks to the merits of the appellant's claims. Second, indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves. A defendant who pleads guilty or *nolo contendere* in a Michigan court, although he relinquishes access to an appeal as of right, is entitled to apply for leave to appeal, and that entitlement is officially conveyed to him. Of critical importance, the intermediate appellate court, unlike the Michigan Supreme Court, sits as an error-correction instance. A court Rule provides that the intermediate court may respond to a leave application in a number of ways: It may grant or deny the application, enter a final decision, grant other relief, request additional material from the record, or require a certified concise statement of proceedings and facts from the lower court. The court's response to the leave application by any of these alternatives—including denial of leave—necessarily entails some evaluation of the merits of the applicant's claims. Pp. 616–618.

This Court rejects Michigan's argument that *Ross* is dispositive here because review in the intermediate appellate court following a plea-

based conviction is discretionary, given the necessity of filing an application for leave to appeal. The *Ross* Court recognized that leave-granting determinations by a State's highest court turn on considerations other than a lower court's commission of error, *e. g.*, the involvement of a matter of "significant public interest." 417 U. S., at 615. Michigan's Supreme Court, like the highest courts of other States, sits not to correct errors in individual cases, but to decide matters of larger public import. By contrast, the intermediate court, as an error-correction instance, is guided in responding to leave to appeal applications by the merits of the particular defendant's claims, not by the general importance of the questions presented. Pp. 618–619.

Whether formally categorized as the decision of an appeal or the disposal of a leave application, the intermediate appellate court's ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive. Parties like Halbert, however, are disarmed in their endeavor to gain first-tier review. *Ross* emphasized that a defendant seeking State Supreme Court review following a first-tier appeal as of right earlier had the assistance of appellate counsel, who will have reviewed the trial court record, researched the legal issues, and prepared a brief reflecting that review and research. 417 U. S., at 615. Such a defendant may also be armed with an opinion of the intermediate appellate court addressing the issues counsel raised. Without such guides keyed to a court of review, a *pro se* applicant's entitlement to seek leave to appeal to Michigan's intermediate court may be more formal than real. Cf. *Swenson* v. *Bosler*, 386 U. S. 258 *(per curiam)*. Persons in Halbert's situation, many of whom have little education, learning disabilities, and mental impairments, are particularly handicapped as self-representatives. See *Kowalski* v. *Tesmer*, 543 U. S. 125, 140 (GINSBURG, J., dissenting). Further, appeals by defendants convicted on their pleas may be "no less complex than other appeals." *Id.*, at 141. Michigan's complex procedures for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled. See *id.*, at 141–142. The State does have a legitimate interest in reducing its judiciary's workload, but providing indigents with appellate counsel will yield applications easier to comprehend. Michigan's Court of Appeals would still have recourse to summary denials of leave applications in cases not warranting further review. And when a defendant's case presents no genuinely arguable issue, appointed counsel may so inform the court. Pp. 619–623.

The Court disagrees with Michigan's contention that, even if Halbert had a constitutionally guaranteed right to appointed counsel for first-

Syllabus

level appellate review, he waived that right by entering a *nolo contendere* plea. At the time he entered his plea, Halbert had no recognized right to appointed appellate counsel he could elect to forgo. Moreover, the trial court did not tell Halbert, simply and directly, that in his case, there would be no access to appointed counsel. Cf. *Iowa* v. *Tovar*, 541 U. S. 77, 81. Pp. 623–624.

Vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which REHNQUIST, C. J., joined as to all but Part III–B–3, *post*, p. 624.

David A. Moran argued the cause for petitioner. On the briefs were *Mark Granzotto*, *Michael J. Steinberg*, *Kary L. Moss*, *Steven R. Shapiro*, and *Terence R. Flanagan*.

Bernard Eric Restuccia, Assistant Attorney General of Michigan, argued the cause for respondent. With him on the brief were *Michael A. Cox*, Attorney General, and *Thomas L. Casey*, Solicitor General.

Gene C. Schaerr argued the cause for the State of Louisiana et al. as *amici curiae* urging affirmance. With him on the brief were *Charles C. Foti*, Attorney General of Louisiana, *Mimi Hunley*, Assistant Attorney General, *Julie E. Cullen*, *Linda T. Coberly*, and *Charles B. Klein*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Mark J. Bennett* of Hawaii, *Steve Carter* of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Rob McKenna* of Washington.*

---

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert J. Grey, Jr.*, *Seth P. Waxman*, *Paul R. Q. Wolfson*, and *Noah A. Levine*; and for the National Association of Criminal Defense

JUSTICE GINSBURG delivered the opinion of the Court.

In 1994, Michigan voters approved a proposal amending the State Constitution to provide that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Mich. Const., Art. 1, § 20. Thereafter, "several Michigan state judges began to deny appointed appellate counsel to indigents" convicted by plea. *Kowalski* v. *Tesmer*, 543 U. S. 125, 127 (2004). Rejecting challenges based on the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Federal Constitution, the Michigan Supreme Court upheld this practice, and its codification in Mich. Comp. Laws Ann. § 770.3a (West 2000). *People* v. *Harris*, 470 Mich. 882, 681 N. W. 2d 653 (2004); *People* v. *Bulger*, 462 Mich. 495, 511, 614 N. W. 2d 103, 110 (2000).

Petitioner Antonio Dwayne Halbert, convicted on his plea of *nolo contendere*, sought the appointment of counsel to assist him in applying for leave to appeal to the Michigan Court of Appeals. The state trial court and the Court of Appeals denied Halbert's requests for appointed counsel, and the Michigan Supreme Court declined review.

Michigan Court of Appeals review of an application for leave to appeal, Halbert contends, ranks as a first-tier appellate proceeding requiring appointment of counsel under *Douglas* v. *California*, 372 U. S. 353 (1963). Michigan urges that appeal to the State Court of Appeals is discretionary and, for an appeal of that order, *Ross* v. *Moffitt*, 417 U. S. 600 (1974), holds counsel need not be appointed. Earlier this Term, in *Kowalski* v. *Tesmer*, this Court, for prudential reasons, declined to reach the classification question posed by Michigan's system for appellate review following a plea of guilty, guilty but mentally ill, or *nolo contendere*. Today,

---

Lawyers et al. by *Anthony J. Franze*, *Sheila B. Scheuerman*, and *Paul M. Rashkind*.

Timothy A. Baughman filed a brief of *amicus curiae* for Wayne County, Michigan, urging affirmance.

Elliot H. Scherker and *Karen M. Gottlieb* filed a brief for the National Legal Aid & Defender Association as *amicus curiae*.

we reach the classification question and conclude that Halbert's case is properly ranked with *Douglas* rather than *Ross*. Accordingly, we hold that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.

I

The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions. *McKane* v. *Durston*, 153 U. S. 684, 687 (1894). Having provided such an avenue, however, a State may not "bolt the door to equal justice" to indigent defendants. *Griffin* v. *Illinois*, 351 U. S. 12, 24 (1956) (Frankfurter, J., concurring in judgment); see *id.*, at 23 (same) ("[W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such . . . review."). *Griffin* held that, when a State conditions an appeal from a conviction on the provision of a trial transcript, the State must furnish free transcripts to indigent defendants who seek to appeal. *Id.*, at 16–20 (plurality opinion). *Douglas* relied on *Griffin*'s reasoning to hold that, in first appeals as of right, States must appoint counsel to represent indigent defendants. 372 U. S., at 357. *Ross* held, however, that a State need not appoint counsel to aid a poor person in discretionary appeals to the State's highest court, or in petitioning for review in this Court. 417 U. S., at 610–612, 615–618.

Cases on appeal barriers encountered by persons unable to pay their own way, we have observed, "cannot be resolved by resort to easy slogans or pigeonhole analysis." *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 120 (1996) (internal quotation marks omitted). Our decisions in point reflect "both equal protection and due process concerns." *Ibid.* "The equal protection concern relates to the legitimacy of fencing out would-be

appellants based solely on their inability to pay core costs," while "[t]he due process concern homes in on the essential fairness of the state-ordered proceedings." *Ibid.;* see also *Evitts* v. *Lucey,* 469 U. S. 387, 405 (1985).

Two considerations were key to our decision in *Douglas* that a State is required to appoint counsel for an indigent defendant's first-tier appeal as of right. First, such an appeal entails an adjudication on the "merits." 372 U. S., at 357. Second, first-tier review differs from subsequent appellate stages "at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court." *Id.,* at 356. Under the California system at issue in *Douglas,* the first-tier appellate court independently examined the record to determine whether to appoint counsel. *Id.,* at 355. When a defendant able to retain counsel pursued an appeal, the *Douglas* Court observed, "the appellate court passe[d] on the merits of [the] case only after having the full benefit of written briefs and oral argument by counsel." *Id.,* at 356. In contrast, when a poor person appealed, "the appellate court [wa]s forced to prejudge the merits [of the case] before it c[ould] even determine whether counsel should be provided." *Ibid.*

In *Ross,* we explained why the rationale of *Douglas* did not extend to the appointment of counsel for an indigent seeking to pursue a second-tier discretionary appeal to the North Carolina Supreme Court or, thereafter, certiorari review in this Court. The North Carolina Supreme Court, in common with this Court we perceived, does not sit as an error-correction instance. 417 U. S., at 615. Principal criteria for state high court review, we noted, included "whether the subject matter of the appeal has significant public interest, whether the cause involves legal principles of major significance to the jurisprudence of the State, [and] whether the decision below is in probable conflict" with the court's precedent. *Ibid.* (internal quotation marks omitted). Further, we pointed out, a defendant who had already bene-

fited from counsel's aid in a first-tier appeal as of right would have, "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." *Ibid.*

II

A

Michigan has a two-tier appellate system comprising the State Supreme Court and the intermediate Court of Appeals. The Michigan Supreme Court hears appeals by leave only. Mich. Comp. Laws Ann. § 770.3(6) (West Supp. 2004). Prior to 1994, the Court of Appeals adjudicated appeals as of right from all criminal convictions. *Bulger*, 462 Mich., at 503–504, 614 N. W. 2d, at 106–107. To reduce the workload of the Court of Appeals, a 1994 amendment to the Michigan Constitution changed the process for appeals following plea-based convictions. *Id.*, at 504, 614 N. W. 2d, at 106–107. As amended, the State Constitution provides: "In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Mich. Const., Art. 1, § 20.

A defendant convicted by plea who seeks review in the Michigan Court of Appeals must now file an application for leave to appeal pursuant to Mich. Ct. Rule 7.205 (2005). In response, the Court of Appeals may, among other things, "grant or deny the application; enter a final decision; [or] grant other relief." Rule 7.205(D)(2). If the court grants leave, "the case proceeds as an appeal of right." Rule 7.205(D)(3). The parties agree that the Court of Appeals, in its orders denying properly filed applications for leave, uniformly cites "lack of merit in the grounds presented" as the basis for its decision. See Tr. of Oral Arg. 21–22, 24, 39.

Under Michigan law, most indigent defendants convicted by plea must proceed *pro se* in seeking leave to appeal.

Michigan Comp. Laws Ann. § 770.3a (West 2000) provides, in relevant part, that a "defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence," except that:

> "(2) The trial court shall appoint appellate counsel for an indigent defendant [if the] prosecuting attorney seeks leave to appeal[, the] defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines[, the] court of appeals or the supreme court grants the defendant's application for leave to appeal[, or the] defendant seeks leave to appeal a conditional plea . . . .
>
> "(3) The trial court may appoint appellate counsel [if the] defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable[, the] defendant objected to the scoring or otherwise preserved the matter for appeal[, and the] sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored." § 770.3a(1)–(3).

In *People* v. *Bulger*, the Michigan Supreme Court considered whether the Federal Constitution secures a right to appointed counsel for plea-convicted defendants seeking review in the Court of Appeals. 462 Mich., at 511, 614 N. W. 2d, at 110. Recognizing *Douglas* and *Ross* as the guiding decisions, 462 Mich., at 511–516, 614 N. W. 2d, at 110–112, the State Supreme Court concluded that appointment of counsel is not required for several reasons: Court of Appeals review following plea-based convictions is by leave and is thus "discretionary," *id.*, at 506–508, 519, 614 N. W. 2d, at 108, 113; "[p]lea proceedings are . . . shorter, simpler, and more routine than trials," *id.*, at 517, 614 N. W. 2d, at 112; and by entering a plea, a defendant "accede[s] to the state's fundamental in-

terest in finality," *ibid.* In *People* v. *Harris*, the Michigan Supreme Court, adhering to *Bulger*, upheld the constitutionality of § 770.3a. 470 Mich. 882, 681 N. W. 2d 653.

B

Petitioner Halbert pleaded *nolo contendere* to two counts of second-degree criminal sexual conduct. App. 23. During Halbert's plea colloquy, the trial court asked Halbert, "You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right," and Halbert answered, "Yes, sir." *Id.*, at 22. The court then advised Halbert of certain instances in which, although the appeal would not be as of right, the court nevertheless "must" or "may" appoint appellate counsel. The court did not tell Halbert, however, that it could not appoint counsel in any other circumstances, including Halbert's own case:

> "THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. Under those conditions I must appoint an attorney, do you understand that?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney for you, do you understand that?

"THE DEFENDANT: Yes, sir." *Id.*, at 22–23 (alteration omitted).[1]

At Halbert's sentencing hearing, defense counsel requested that the sentences for the two counts run concurrently, but urged no error in the determination of Halbert's exposure under the Michigan sentencing guidelines. *Id.*, at 33. The trial court set Halbert's sentences to run consecutively. *Id.*, at 35. Halbert submitted a handwritten motion to withdraw his plea the day after sentencing. Denying the motion, the trial court stated that Halbert's "proper remedy is to appeal to the Michigan Court of Appeals." *Id.*, at 43.

Twice thereafter and to no avail, Halbert asked the trial court to appoint counsel to help him prepare an application for leave to appeal to the intermediate appellate court. He submitted his initial request on a form provided by the State. *Id.*, at 46–50, 53–57. The trial court denied the request. *Id.*, at 44–45, 51–52. Halbert next sent the trial court a letter and accompanying motion, again seeking appointed counsel. *Id.*, at 58. Halbert stated that his sentence had been misscored and that he needed the aid of counsel to preserve the issue before undertaking an appeal. *Id.*, at 58, 61–62. Halbert also related that he had "required special education due to learning disabilities," *id.*, at 61, and was "mentally impaired," *id.*, at 62. To prepare his *pro se* filings, he noted,

[1] Michigan provided Halbert with a form titled "Notice of Rights After Sentencing (After Plea of Guilty/Nolo Contendere) and Request for Appointment of Attorney." App. 46–50, 53–57. Resembling the advice conveyed to Halbert by the trial judge, the form described the circumstances in which counsel must or may be appointed, but did not expressly state that, absent such circumstances, counsel would not be provided. As revised, Michigan's notice form now states: "You are not entitled to have a lawyer appointed at public expense to assist you in filing an application for leave to appeal . . . ." Advice Concerning Right To Appeal After Plea of Guilty/Nolo Contendere (rev. June 2004), available at http://courts.michigan.gov/scao/courtforms/appeals/cc265b.pdf (all Internet materials as visited June 21, 2005, and available in Clerk of Court's case file).

he was obliged to rely on the assistance of fellow inmates. *Id.*, at 61. The trial court denied Halbert's motion; citing *Bulger*, the court stated that Halbert "does not have a constitutional . . . right to appointment of appellate counsel to pursue a discretionary appeal." App. 64.

Again using a form supplied by the State and acting *pro se*, Halbert filed an application for leave to appeal. *Id.*, at 66–71. He asserted claims of sentencing error and ineffective assistance of counsel, *id.*, at 68, and sought, *inter alia*, remand for appointment of appellate counsel and resentencing, *id.*, at 71. In a standard form order, the Court of Appeals denied Halbert's application "for lack of merit in the grounds presented." *Id.*, at 72.

The State Supreme Court, dividing 5 to 2, denied Halbert's application for leave to appeal to that court. The dissenting justices would have provided for the appointment of counsel, and would have allowed counsel to file a supplemental leave application prior to the Court of Appeals' reconsideration of Halbert's pleas. *Id.*, at 84.

We granted certiorari, 543 U. S. 1042 (2005), to consider whether the denial of appointed counsel to Halbert violated the Fourteenth Amendment. We now vacate the judgment of the Michigan Court of Appeals.

III

Petitioner Halbert's case is framed by two prior decisions of this Court concerning state-funded appellate counsel, *Douglas* and *Ross*. The question before us is essentially one of classification: With which of those decisions should the instant case be aligned?[2] We hold that *Douglas* provides the

[2]The question at hand, all Members of the Court agree, is whether this case should be bracketed with *Douglas* v. *California*, 372 U. S. 353 (1963), because appointed counsel is sought for initial review before an intermediate appellate court, or with *Ross* v. *Moffitt*, 417 U. S. 600 (1974), because a plea-convicted defendant must file an application for leave to appeal. See *post*, at 628 (THOMAS, J., dissenting) ("Michigan's system bears some similarity to the state systems at issue in both *Douglas* and *Ross*.").

controlling instruction. Two aspects of the Michigan Court of Appeals' process following plea-based convictions lead us to that conclusion. First, in determining how to dispose of an application for leave to appeal, Michigan's intermediate appellate court looks to the merits of the claims made in the application. Second, indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves.

A defendant who pleads guilty or *nolo contendere* in a Michigan court does not thereby forfeit all opportunity for appellate review. Although he relinquishes access to an appeal as of right, he is entitled to apply for leave to appeal, and that entitlement is officially conveyed to him. See *supra*, at 612; Mich. Ct. Rule 6.425(E)(2)(a) (2005) ("[T]he defendant is entitled to file an application for leave to appeal."); see also Advice Concerning Right To Appeal, ¶ 1 ("You are entitled to file an application for leave to appeal with the Court of Appeals."), see *supra*, at 615, n. 1. Of critical importance, the tribunal to which he addresses his application, the Michigan Court of Appeals, unlike the Michigan Supreme Court, sits as an error-correction instance.[3]

The Court of Appeals may respond to a leave application in a number of ways. It "may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court . . . whose order

---

[3] Both the majority and the dissent in *People* v. *Bulger*, 462 Mich. 495, 614 N. W. 2d 103 (2000), described the State's intermediate appellate court's function as error correction. Compare *id.*, at 516–518, 614 N. W. 2d, at 112–113 (in the majority's view, the Court of Appeals could perform its review function, despite the defendant's lack of representation, because plea-convicted defendants have ample aid for preservation of their claims in the trial court and ineffective assistance of counsel should be readily apparent to the Court of Appeals from the record), with *id.*, at 543, 614 N. W. 2d, at 125 (Cavanagh, J., dissenting) ("[T]he function of our Court of Appeals is reviewing the merits and correcting errors made by the lower courts.").

is being appealed." Mich. Ct. Rule 7.205(D)(2) (2005). When the court denies leave using the stock phrase "for lack of merit in the grounds presented," its disposition may not be equivalent to a "final decision" on the merits, *i. e.*, the disposition may simply signal that the court found the matters asserted unworthy of the expenditure of further judicial resources. But the court's response to the leave application by any of the specified alternatives—including denial of leave—necessarily entails some evaluation of the merits of the applicant's claims.

Michigan urges that review in the Court of Appeals following a plea-based conviction is as "discretionary" as review in the Michigan Supreme Court because both require an application for leave to appeal. See *Bulger*, 462 Mich., at 506–508, 519, 614 N. W. 2d, at 108, 113; Brief for Respondent 31–34.[4] Therefore, Michigan maintains, *Ross* is dispositive of this case. The Court in *Ross*, however, recognized that leave-granting determinations by North Carolina's Supreme Court turned on considerations other than the commission of error by a lower court, *e. g.*, the involvement of a matter of "significant public interest." See *supra*, at 611. Michigan's Supreme Court, too, sits not to correct errors in individual cases, but to decide matters of larger public import. See Mich. Ct. Rule 7.302(B)(2)–(3) (2005) (criteria for granting leave to appeal to the Michigan Supreme Court include whether a case presents an "issue [of] significant public interest" or "involves legal principles of major significance to the state's jurisprudence"); *Great Lakes Realty Corp.* v. *Pe-*

---

[4] The *Bulger* opinions nowhere describe the discretion exercised by the Michigan Court of Appeals as so unconstrained that it may "deny leave [to appeal] for any reason, or for no reason at all." *Post*, at 633 (THOMAS, J., dissenting). Compare *Bulger*, 462 Mich., at 511, 614 N. W. 2d, at 110 (appeal to intermediate court is discretionary because a defendant must "obtai[n] leave"); *id.*, at 506–508, 519, 614 N. W. 2d, at 108, 113, with *id.*, at 542–543, 614 N. W. 2d, at 125 (Cavanagh, J., dissenting) (Court of Appeals may deny leave to appeal where error is not outcome determinative).

ters, 336 Mich. 325, 328–329, 57 N. W. 2d 901, 903 (1953) (equating denial of an application for leave to appeal to the Michigan Supreme Court with denial of a petition for writ of certiorari in this Court); see also this Court's Rule 10 (considerations guiding decision whether to grant certiorari). By contrast, the Michigan Court of Appeals, because it is an error-correction instance, is guided in responding to leave to appeal applications by the merits of the particular defendant's claims, not by the general importance of the questions presented.

Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive. Parties like Halbert, however, are disarmed in their endeavor to gain first-tier review. As the Court in *Ross* emphasized, a defendant seeking State Supreme Court review following a first-tier appeal as of right earlier had the assistance of appellate counsel. The attorney appointed to serve at the intermediate appellate court level will have reviewed the trial court record, researched the legal issues, and prepared a brief reflecting that review and research. 417 U. S., at 615. The defendant seeking second-tier review may also be armed with an opinion of the intermediate appellate court addressing the issues counsel raised. A first-tier review applicant, forced to act *pro se*, will face a record unreviewed by appellate counsel, and will be equipped with no attorney's brief prepared for, or reasoned opinion by, a court of review.

The *Bulger* court concluded that "a pro se defendant seeking discretionary review" in the Court of Appeals is adequately armed because he "will have the benefit of a transcript, trial counsel's framing of the issues in [a] motion to withdraw, and the trial court's ruling on the motion." 462 Mich., at 518, 614 N. W. 2d, at 113; see also Mich. Ct. Rule 6.005(H)(4) (2005) (trial counsel must file "postconviction mo-

tions the lawyer deems appropriate, including motions . . . to withdraw plea, or for resentencing"); *post*, at 634–635 (THOMAS, J., dissenting).[5] But we held in *Swenson* v. *Bosler*, 386 U. S. 258 (1967) *(per curiam)*, that comparable materials prepared by trial counsel are no substitute for an appellate lawyer's aid. There, the Missouri court reviewing an indigent's post-trial appeal had before it a transcript plus trial counsel's "notice of appeal and . . . motion for new trial which specifically designated the issues which could be considered on direct appeal." *Id.*, at 259. The absence of counsel in these circumstances, *Bosler* held, "violated [the defendant's] Fourteenth Amendment rights, as defined in *Douglas*." *Ibid.* Adhering to *Douglas*, we explained that "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the [record] may well be of substantial benefit to the defendant [and] may not be denied . . . solely because of his indigency." 386 U. S., at 259. Although *Bosler* involved a post-trial rather than postplea appeal, the Court recognized that a transcript and motion by trial counsel are not adequate stand-ins for an appellate lawyer's review of the record and legal research. Without guides keyed to a court of review, a *pro se* applicant's entitlement to seek leave to appeal to Michigan's intermediate court may be more formal than real.

Persons in Halbert's situation are particularly handicapped as self-representatives. As recounted earlier this Term, "[a]pproximately 70% of indigent defendants represented by appointed counsel plead guilty, and 70% of those convicted

---

[5] This assumes that trial counsel will recognize, in a postconviction motion, any issues appropriate for preservation for appellate review. A lawyer may not, however, perceive his own errors or the need for such a motion. Defense counsel here, for example, whose performance Halbert alleged to be ineffective, apparently did not assist Halbert in preparing and filing his motion to withdraw his plea. See *supra*, at 615–616.

are incarcerated." *Kowalski*, 543 U. S., at 140 (GINSBURG, J., dissenting). "[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills." *Ibid.* (citation omitted). "[S]even out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article." *Ibid.* Many, Halbert among them, have learning disabilities and mental impairments. See U. S. Dept. of Justice, Bureau of Justice Statistics, A. Beck & L. Maruschak, Mental Health Treatment in State Prisons, 2000, pp. 3–4 (July 2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf (identifying as mentally ill some 16% of state prisoners and noting that 10% receive psychotropic medication).

Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments. See *Evitts*, 469 U. S., at 393 ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."); *Gideon* v. *Wainwright*, 372 U. S. 335, 345 (1963) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law." (quoting *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932))). Appeals by defendants convicted on their pleas may involve "myriad and often complicated" substantive issues, *Kowalski*, 543 U. S., at 145 (GINSBURG, J., dissenting), and may be "no less complex than other appeals," *id.*, at 141 (same). One who pleads guilty or *nolo contendere* may still raise on appeal

> "constitutional defects that are irrelevant to his factual guilt, double jeopardy claims requiring no further factual record, jurisdictional defects, challenges to the sufficiency of the evidence at the preliminary examination,

> preserved entrapment claims, mental competency claims, factual basis claims, claims that the state had no right to proceed in the first place, including claims that a defendant was charged under an inapplicable statute, and claims of ineffective assistance of counsel." *Ibid.* (quoting *Bulger*, 462 Mich., at 561, 614 N. W. 2d, at 133–134 (Cavanagh, J., dissenting); citations omitted).

Michigan's very procedures for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled. See *Kowalski*, 543 U. S., at 141–142 (GINSBURG, J., dissenting). Michigan Ct. Rule 7.205(A) (2005) requires the applicant to file for leave to appeal within 21 days after the trial court's entry of judgment. "The defendant must submit five copies of the application 'stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument . . . in support of the appellant's position on each issue.'" *Kowalski*, 543 U. S., at 141 (GINSBURG, J., dissenting) (quoting Rule 7.205(B)(1)). Michigan does provide "a three-page form application accompanied by two pages of instructions for defendants seeking leave to appeal after sentencing on a . . . plea. But th[e] form is unlikely to provide adequate aid to an indigent and poorly educated defendant." *Ibid.* It directs the defendant to provide information such as "charge code(s), MCL citation/PACC Code," state the issues and facts relevant to the appeal, and "'state the law that supports your position and explain how the law applies to the facts of your case.'" *Id.*, at 141–142 (quoting Application for Leave To Appeal After Sentencing on Plea of Guilty or Nolo Contendere (rev. Oct. 2003), http://courts.michigan.gov/scao/courtforms/appeals/cc405.pdf; some internal quotation marks omitted). "This last task would not be onerous for an applicant familiar with law school examinations, but it is a tall order for a defendant of marginal literacy." *Kowalski*, 543 U. S., at 142 (GINSBURG, J., dissenting).

While the State has a legitimate interest in reducing the workload of its judiciary, providing indigents with appellate counsel will yield applications easier to comprehend.[6] Michigan's Court of Appeals would still have recourse to summary denials of leave applications in cases not warranting further review. And when a defendant's case presents no genuinely arguable issue, appointed counsel may so inform the court. See *Anders* v. *California*, 386 U. S. 738, 744 (1967) ("[I]f counsel finds [the] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw," filing "a brief referring to anything in the record that might arguably support the appeal."); Tr. of Oral Arg. 27 ("[I]n a significant percentage of the cases . . . [,] after reviewing the case, the appellate counsel then concludes that there is no merit . . . , at which point then either a motion to withdraw may be filed or . . . the Michigan equivalen[t] of an Anders brief.").

Michigan contends that, even if Halbert had a constitutionally guaranteed right to appointed counsel for first-level appellate review, he waived that right by entering a plea of *nolo contendere*. We disagree. At the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo.[7] Moreover, as earlier ob-

---

[6] "No one questions," the *Bulger* court stated, "that the appointment of appellate counsel at state expense would be more efficient and helpful not only to defendants, but also to the appellate courts." 462 Mich., at 520, 614 N. W. 2d, at 114.

[7] Assuming, as JUSTICE THOMAS suggests, that whether Michigan law conferred on Halbert a postplea right to appointed appellate counsel is irrelevant to whether Halbert waived a federal constitutional right to such counsel, *post*, at 639–640, the remainder of the dissent's argument slips from our grasp, see *post*, at 640–641. No conditional waiver—"on[e] in which a defendant agrees that, if he has . . . a right, he waives it," *post*, at 640—is at issue here. Further, nothing in Halbert's plea colloquy indicates that he waived an "unsettled," but assumed, right to the assistance of appointed appellate counsel, postplea. See *post*, at 640–641.

served, the trial court did not tell Halbert, simply and directly, that in his case, there would be no access to appointed counsel. See *supra*, at 614–615; cf. *Iowa* v. *Tovar*, 541 U. S. 77, 81 (2004) ("Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.'" (quoting *Brady* v. *United States*, 397 U. S. 742, 748 (1970))).[8]

* * *

For the reasons stated, we vacate the judgment of the Michigan Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom THE CHIEF JUSTICE joins as to all but Part III–B–3, dissenting.

Petitioner Antonio Halbert pleaded no contest to charges that he sexually assaulted his stepdaughter and another

---

[8] We are unpersuaded by the suggestion that, because a defendant may be able to waive his right to appeal entirely, Michigan can consequently exact from him a waiver of the right to government-funded appellate counsel. See Tr. of Oral Arg. 14. Many legal rights are "presumptively waivable," *post*, at 637 (THOMAS, J., dissenting), and if Michigan were to require defendants to waive all forms of appeal as a condition of entering a plea, that condition would operate against moneyed and impoverished defendants alike. A required waiver of the right to appointed counsel's assistance when applying for leave to appeal to the Michigan Court of Appeals, however, would accomplish the very result worked by Mich. Comp. Laws Ann. § 770.3a (West 2000): It would leave indigents without access to counsel in that narrow range of circumstances in which, our decisions hold, the State must affirmatively ensure that poor defendants receive the legal assistance necessary to provide meaningful access to the judicial system. See *Douglas*, 372 U. S., at 357–358; *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 110–113 (1996); cf. *Griffin* v. *Illinois*, 351 U. S. 12, 23 (1956) (Frankfurter, J., concurring in judgment) (ordinarily, "a State need not equalize economic conditions" between criminal defendants of lesser and greater wealth).

young girl. Michigan law did not provide Halbert—as a defendant convicted by a plea of guilty or no contest—an appointed attorney to help him prepare an application for leave to appeal to the Michigan Court of Appeals. The Court holds Michigan's law unconstitutional as applied to Halbert. It fails, however, to ground its analysis in any particular provision of the Constitution or in this Court's precedents. It also ignores that, even if there is a right to counsel in the circumstances at issue, the right is waivable and was validly waived here. I respectfully dissent.

I

To understand why the Court's holding is an unwarranted extension of our precedents, it is necessary first to understand the limits that Michigan places on the provision of court-appointed counsel for defendants who plead guilty or no contest. Before 1994, Michigan afforded all criminal defendants the right to appeal their convictions to the Michigan Court of Appeals. By the early 1990's, however, the Michigan Court of Appeals had a backlog of thousands of cases awaiting decision, nearly a third of which were appeals by defendants who had pleaded guilty or no contest. *People* v. *Bulger*, 462 Mich. 495, 504, 614 N. W. 2d 103, 107 (2000). To reduce this backlog, Michigan voters amended the Michigan Constitution in 1994 to provide that "[i]n every criminal prosecution, the accused shall . . . have an appeal as a matter of right, except [that] an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Mich. Const., Art. 1, § 20; *Bulger*, *supra*, at 504, 614 N. W. 2d, at 107. This constitutional amendment created a two-track system for Michigan defendants: The Michigan Court of Appeals must hear the appeals of those who dispute their guilt, while it may elect to hear the appeals of those who concede or do not contest their guilt of the substantive crime.

In 1999, the Michigan Legislature enacted the statute at issue here. It provides that, in general, a "defendant who

pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence." Mich. Comp. Laws Ann. § 770.3a(1) (West 2000). Defendants who plead guilty or no contest do not, however, invariably lose the right to counsel on appeal; the statute contains exceptions to the general rule. The trial court must appoint appellate counsel for plea-convicted defendants if the State seeks leave to appeal, the defendant's sentence exceeds the upper limit of the applicable minimum guidelines range, or the defendant seeks leave to appeal a conditional plea. § 770.3a(2). Further, the trial court may appoint appellate counsel for plea-convicted defendants who seek leave to appeal certain sentencing errors. § 770.3a(3). Finally, if the Court of Appeals grants leave to appeal, "the case proceeds as an appeal of right," Mich. Ct. Rule 7.205(D)(3) (2005), and the plea-convicted defendant is entitled to appointed counsel, Mich. Comp. Laws Ann. § 770.3a(2)(c). Thus, plea-convicted defendants lack appellate counsel only in certain types of cases, and only then when they are seeking leave to appeal.

II

The majority nevertheless holds that Michigan's system is constitutionally inadequate. It finds that all plea-convicted indigent defendants have the right to appellate counsel when seeking leave to appeal. The majority does not say where in the Constitution that right is located—the Due Process Clause, the Equal Protection Clause, or some purported confluence of the two. *Ante*, at 610–611. Nor does the majority attempt to anchor its holding in the history of those Clauses. *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 131, 133, 138 (1996) (THOMAS, J., dissenting). Nor does the majority even attempt to ground its holding in the entirety of this Court's jurisprudence, which does not require paid appellate assistance for indigent criminal defendants. *Id.*, at 131–138. The

majority ignores the bulk of that jurisprudence and leaves those arguments unanswered.

Instead, the majority pins its hopes on a single case: *Douglas* v. *California*, 372 U. S. 353 (1963). *Douglas*, however, does not support extending the right to counsel to any form of discretionary review, as *Ross* v. *Moffitt*, 417 U. S. 600 (1974), and later cases make clear. Moreover, Michigan has not engaged in the sort of invidious discrimination against indigent defendants that *Douglas* condemns. Michigan has done no more than recognize the undeniable difference between defendants who plead guilty and those who maintain their innocence, in an attempt to divert resources from largely frivolous appeals to more meritorious ones. The majority substitutes its own policy preference for that of Michigan voters, and it does so based on an untenable reading of *Douglas*.

A

In *Douglas*, California granted an initial appeal as of right to all convicted criminal defendants. 372 U. S., at 356. However, the California Court of Appeal appointed counsel for indigent defendants only after determining whether counsel would be useful to the defendant or the court. *Ibid.* Thus the California appellate court was "forced to prejudge the merits" of indigent defendants' appeals, while it judged the merits of other defendants' appeals only after briefing and oral argument. *Ibid.*

In previous cases, this Court had considered state-imposed conditions like transcript and filing fees that prevented indigent criminal defendants from obtaining any appellate review. *Ross*, *supra*, at 606–607 (discussing *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and its progeny). By contrast, in *Douglas*, California provided appellate review to all criminal defendants, but it did not provide a state subsidy for indigent defendants whose claims appeared unlikely to benefit from counsel's assistance. This Court nevertheless held that when States provide a first appeal as of right, they must

supply indigent defendants with counsel. *Ross*, *supra*, at 607. In *Ross*, however, this Court declined to extend *Douglas*' right to counsel beyond initial appeals as of right. States need not appoint counsel for indigent defendants who seek discretionary review in a State's highest court or this Court. *Ross*, *supra*, at 616–618.

Michigan's system bears some similarity to the state systems at issue in both *Douglas* and *Ross*. Like the defendant in *Douglas*, Halbert requests appointed counsel for an initial appeal before an intermediate appellate court. But like the defendant in *Ross*, Halbert requests appointed counsel for an appeal that is discretionary, not as of right. Crucially, however, *Douglas* noted that its decision extended only to initial appeals *as of right*—and later cases have repeatedly reaffirmed that understanding.[1] This Court has never required States to appoint counsel for discretionary review. *Ross*, *supra*, at 610; *Murray* v. *Giarratano*, 492 U. S. 1, 10–11 (1989); see also *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987). And an appeal permitted only "by leave of the court," Mich. Const., Art. 1, § 20, is discretionary—as the Michigan Supreme Court has recognized, *Bulger*, 462 Mich., at 519, 614 N. W. 2d, at 113; *id.*, at 542–543, 614 N. W. 2d, at 125 (Cavanagh, J., dissenting). Neither *Douglas* nor any other decision of this Court warrants extending the right to counsel to discretionary review, even on a defendant's initial appeal.

---

[1] *Douglas*, 372 U. S., at 357; *Ross*, 417 U. S., at 608 ("*[Douglas]* extended only to initial appeals as of right"); *Evitts* v. *Lucey*, 469 U. S. 387, 394 (1985) (*Douglas* "is limited to the first appeal as of right"); *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further"); *Coleman* v. *Thompson*, 501 U. S. 722, 755 (1991) ("*[Douglas]* establish[es] that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court"); see also *Wainwright* v. *Torna*, 455 U. S. 586, 587 (1982) *(per curiam)* ("*[Ross]* held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court").

Just as important, the rationale of *Douglas* does not support extending the right to counsel to this particular form of discretionary review. Admittedly, the precise rationale for the *Griffin/Douglas* line of cases has never been made explicit. *Ross*, *supra*, at 608–609. Those cases, however, have a common theme. States may not impose financial barriers that preclude indigent defendants from securing appellate review altogether. *Griffin*, 351 U. S., at 17–18 (plurality opinion); *id.*, at 22 (Frankfurter, J., concurring in judgment); *Burns* v. *Ohio*, 360 U. S. 252, 258 (1959); *Smith* v. *Bennett*, 365 U. S. 708, 713–714 (1961). Nor may States create "'unreasoned distinctions'" among defendants, *M. L. B.*, 519 U. S., at 111 (quoting *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966)); *Douglas*, *supra*, at 356; *Griffin*, *supra*, at 22–23 (Frankfurter, J., concurring in judgment), that "arbitrarily cut off appeal rights for indigents while leaving open avenues of appeals for more affluent persons," *Ross*, *supra*, at 607.

Far from being an "arbitrary" or "unreasoned" distinction, Michigan's differentiation between defendants convicted at trial and defendants convicted by plea is sensible. First and perhaps foremost, the danger of wrongful convictions is less significant than in *Douglas*. In *Douglas*, California preliminarily denied counsel to all indigent defendants, regardless of whether they maintained their innocence at trial or conceded their guilt by plea. Here, Michigan preliminarily denies paid counsel only to indigent defendants who admit or do not contest their guilt. And because a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea," *Tollett* v. *Henderson*, 411 U. S. 258, 267 (1973), the potential issues that can be raised on appeal are more limited, *Bulger*, 462 Mich., at 517, and n. 7, 614 N. W. 2d, at 112–113, and n. 7. Further, as the Michigan Supreme Court has explained:

> "Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the

> 'factual basis' for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual." *Id.*, at 517, 614 N. W. 2d, at 112.

When a defendant pleads in open court, there is less need for counsel to develop the record and refine claims to present to an appellate court. These are all "'[r]easoned distinctions'" between defendants convicted by trial and those convicted by their own plea. *M. L. B.*, *supra*, at 111 (quoting *Rinaldi*, *supra*, at 310).

The brief history of Michigan's system confirms this. When Michigan voters amended the State Constitution to establish the current system, roughly 13,000 civil and criminal appeals per year clogged the Michigan Court of Appeals' docket. Of those, nearly a third were appeals by criminal defendants who had pleaded guilty or no contest. Even though at the time plea-convicted defendants were appointed paid appellate counsel, few of these defendants were granted relief on appeal. Simply put, Michigan's bar and bench were devoting a substantial portion of their scarce resources to thousands of cases with little practical effect. Reallocating resources was not "invidious discrimination" against criminal defendants, indigent or otherwise. *Douglas*, 372 U. S., at 356 (internal quotation marks omitted). It was an attempt to ensure "that frivolous appeals [were] not subsidized and public moneys not needlessly spent." *Griffin*, *supra*, at 24 (Frankfurter, J., concurring in judgment).

Today's decision will therefore do no favors for indigent defendants in Michigan—at least, indigent defendants with nonfrivolous claims. While defendants who admit their guilt will receive more attention, defendants who maintain their innocence will receive less. Even some defendants who plead guilty will feel the pinch, because plea-convicted defendants are entitled to counsel in preparing their leave applications if, for example, they appeal from conditional

pleas, Mich. Comp. Laws Ann. § 770.3a(2)(d) (West 2005), or their sentences exceed the applicable guidelines ranges, § 770.3a(2)(b). And any plea-convicted defendant granted leave to appeal is entitled to appointed counsel. § 770.3a(2)(c). Holding Michigan's resources constant (since we have no control over the State's bar or budget), the majority's policy choice to redistribute the State's limited resources only harms those most likely to have worthwhile claims—to say nothing of "the cost of enabling courts and prosecutors to respond to the 'over-lawyering' of minor cases." *Alabama* v. *Shelton*, 535 U. S. 654, 681 (2002) (SCALIA, J., dissenting); cf. *Rompilla* v. *Beard*, *ante*, at 403 (KENNEDY, J., dissenting). Then, too, Michigan is under no constitutional obligation to provide appeals for plea-convicted defendants. *Ante*, at 610 (citing *McKane* v. *Durston*, 153 U. S. 684 (1894)). Michigan may decline to provide an appellate process altogether (since the Court's ruling increases the cost of having a system of appellate review). Surely plea-convicted defendants would prefer appeals with limited access to counsel than no appeals at all.

B

The majority does not attempt to demonstrate that Michigan's system is the sort of "unreasoned" discrimination against indigent defendants *Douglas* prohibits. Instead, the majority says that this case is earmarked by two considerations that were also key to this Court's decision in *Douglas:* First, when a plea-convicted defendant seeks leave to appeal, the Michigan Court of Appeals adjudicates the leave application with reference to the merits. *Ante*, at 617. Second, the plea-convicted defendant who seeks leave to appeal is "generally ill equipped to represent [himself]." *Ibid.* Neither of these arguments is correct.

1

The majority reasons that in adjudicating an application for leave to appeal, the Michigan Court of Appeals "is

guided . . . by the merits of the particular defendant's claims." *Ante*, at 619. The distinction that *Douglas* drew, however, was not between appellate systems that involve "some evaluation of the merits of the applicant's claims" and those that do not, *ante*, at 618, but instead between discretionary and mandatory review. *Supra*, at 627–630. Of course the California intermediate courts in *Douglas* evaluated cases on their merits: These courts were hearing appeals as of right.

The Michigan Court of Appeals probably does consider "the merits of the applicant's claims" in exercising its discretion; so do other courts of discretionary review, including this Court. For instance, this Court would be unlikely to grant certiorari in a case to announce a rule that could not alter the case's disposition, or to correct an error that had not affected the proceedings below. This Court often considers whether errors are worth correcting in both plenary and summary dispositions. None of this converts discretionary, error-noticing review into mandatory, error-correcting review.

Likewise, the Michigan Court of Appeals is not required to hear particular cases or correct particular errors. It may elect to hear cases when it finds the trial court's disposition questionable or dubious. Or it may elect to hear cases when it finds the trial court's disposition important or interesting. For all we know, it may (and probably does) consider both. Regardless, the Court of Appeals' decision to grant review remains "discretionary," because it does not depend on "whether there has been 'a correct adjudication of guilt' in every individual case." *Ross*, 417 U. S., at 615. Like other courts of discretionary review, the Court of Appeals may opt to correct errors, *ante*, at 617–619, and n. 3—but it is not compelled to do so.

The majority appears to dispute that review before the Michigan Court of Appeals is truly discretionary, *ante*, at 618–619, and n. 4, but it provides no support for its speculation. Unlike the California Court of Appeal in *Douglas*,

the Michigan Court of Appeals has discretion in deciding whether to grant leave applications. See *Bulger*, 462 Mich., at 519, 614 N. W. 2d, at 113 (describing the issue as "whether a defendant is entitled under the federal constitution to appointed counsel in a first *discretionary* appeal from a plea-based conviction" (emphasis in original)); *id.*, at 542–543, 614 N. W. 2d, at 125 (Cavanagh, J., dissenting) ("Nothing in our court rules or statute preclude the Court of Appeals from denying leave even though it may believe that the trial court's decision was incorrect"). So far as we can tell, the Michigan Court of Appeals' decision to grant or deny a leave application is not constrained by any state constitutional provision, statute, or court rule. The Michigan Court of Appeals may deny leave for any reason, or for no reason at all.

The majority's holding suggests that Michigan's system would pass constitutional muster if the Court of Appeals recited "lack of importance in the grounds presented" as its ground for denying leave, *ante*, at 618–619, or if its decisional criteria were set forth in a statute, judicial decision, or court rule, *ibid.* Yet the relevant inquiry under *Douglas* and *Ross* is whether the Court of Appeals is obliged to review the case—not whether the Court of Appeals must or does offer a particular ground for declining review.

2

The majority also asserts that, without counsel, plea-convicted defendants who seek leave to appeal are "generally ill equipped to represent themselves." *Ante*, at 617. This overgeneralizes *Douglas*' rationale. The *Douglas* Court was concerned with the "barren record" that would follow a defendant on appeal. 372 U. S., at 356. For "where the record [was] unclear or the errors [were] hidden," the appellate court would have difficulty detecting errors without the assistance of counsel. *Id.*, at 358.

This is in part why this Court in *Ross* did not extend the right to counsel to discretionary review before the North

Carolina Supreme Court. Before that court, a defendant applying for leave had "a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." 417 U. S., at 615. Coupled with whatever the defendant might submit on his own, these materials provided the State Supreme Court "with an adequate basis for its decision to grant or deny review." *Ibid.*

The majority does not argue that indigent plea-convicted defendants who file leave applications do so with a "barren record," *Douglas*, *supra*, at 356, or that the Michigan Court of Appeals lacks an "adequate basis" for reviewing their leave applications, *Ross*, *supra*, at 615. The Michigan Supreme Court put it best:

> "[Michigan's] court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation. Accordingly, a pro se defendant seeking discretionary review will have the benefit of a transcript, trial counsel's framing of the issues in the motion to withdraw, and the trial court's ruling on the motion." *Bulger*, *supra*, at 518, 614 N. W. 2d, at 113; see also Mich. Ct. Rule 6.005(H)(4) (2005).

As in *Ross*, these materials aid both the plea-convicted defendant and the Michigan Court of Appeals in identifying claims appropriate for plenary consideration. A plea-convicted defendant does not face a record unreviewed by counsel, and he does not lack any reasoned treatment of his claims. And, again, plea proceedings tend to be more transparent than trials, *supra*, at 629–630; "less danger exists in plea cases that the record will be so unclear, or the errors so hidden," *Bulger*, *supra*, at 517, 614 N. W. 2d, at 112, that the Michigan Court of Appeals will be unable to identify issues that deserve further examination on appeal. After all, the

Michigan Court of Appeals need know only enough to decide whether to grant further review. Should it elect to do so, Michigan law requires the appointment of counsel to aid in the appeal. Mich. Comp. Laws Ann. § 770.3a(2)(c) (2005).

The majority's unwillingness to confront the distinctions between Michigan's system and the California system at issue in *Douglas* is made clear by its reliance on *Swenson* v. *Bosler*, 386 U. S. 258 (1967) *(per curiam)*. *Swenson* considered whether indigent defendants convicted at trial have a right to appointed counsel during their initial appeal as of right, even if the State provides indigent defendants with a trial transcript and a motion for a new trial prepared by trial counsel. *Id.*, at 258–259. But *Douglas* had already answered that question, as this Court summarily declared: "[Appointed counsel] may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him *as a matter of right*." 386 U. S., at 259 (emphasis added). Of course, Michigan's entire argument is that there is a "[r]easoned distinctio[n]" between defendants convicted following trials and pleas, as there is between appeals as of right and discretionary review. *M. L. B.*, 519 U. S., at 111 (internal quotation marks omitted); Brief for Respondent 28. This Court's brief, *per curiam* opinion in *Swenson* did not consider, much less address, these arguments.

Lacking support in this Court's cases, the majority effects a not-so-subtle shift from whether the record is adequate to enable discretionary review to whether plea-convicted defendants are generally able to "[n]aviga[te] the appellate process without a lawyer's assistance." *Ante*, at 621. This rationale lacks any stopping point. *Pro se* defendants may have difficulty navigating discretionary direct appeals and collateral proceedings, but this Court has never extended the right to counsel beyond first appeals as of right. *Supra*, at 627–628, and n. 1. The majority does not demonstrate that *pro se* defendants have any more difficulty filing leave appli-

cations before the Michigan courts than, say, filing petitions for certiorari before this Court.

In fact, this Court receives thousands of *pro se* petitions every year that list "the date and nature of the judgment or order appealed from," Mich. Ct. Rule 7.205(B)(1) (2005); "reci[te] the appellant's allegations of error and the relief sought," *ibid.*; and "se[t] forth a concise argument . . . in support of the appellant's position on each issue," *ibid.* See this Court's Rule 14 (setting forth analogous requirements for petitions for writs of certiorari). Michigan actually provides a three-page form application accompanied by two pages of instructions for defendants seeking leave to appeal after sentencing on a plea. It counsels defendants to "state the issues and facts relevant to the appeal," and "state the law that supports your position and explain how the law applies to the facts of your case." *Ante*, at 622 (internal quotation marks omitted). The majority gives no clue as to how Michigan could make its procedures for seeking leave to appeal less intimidating to the uncounseled. *Ibid.* Regardless, Michigan's procedures are more than sufficient to enable discretionary review.

The majority then attempts to soften the blow by saying that it is doing the State a favor, because "providing indigents with appellate counsel will yield applications easier to comprehend." *Ante*, at 623. Even assuming the majority's paternalism is accurate, there is no evidence that the Michigan courts currently have difficulty adjudicating leave applications. At the least, the majority leaves unexplained why the Michigan courts have greater difficulty than do state and federal courts considering discretionary direct appeals and collateral proceedings. And even assuming the Michigan courts have special difficulty, it is unlikely any marginal gains will offset the harms wrought by the majority's preference for redistributing resources to a set of generally less meritorious claims. Whether or not one agrees with

the policy choice made by Michigan voters, it is perfectly constitutional.

III

Even assuming that there is a right to appointed appellate counsel in these circumstances, the right, like the vast majority of other procedural rights, is waivable, despite the majority's dictum to the contrary. Moreover, Michigan's statutory prohibition on appointed appellate counsel does not prevent defendants from waiving any constitutional right to such counsel. And, in this case, Halbert's waiver was knowing and intelligent.

A

Legal rights, even constitutional ones, are presumptively waivable. *United States* v. *Mezzanatto*, 513 U. S. 196, 200–201 (1995); see also *New York* v. *Hill*, 528 U. S. 110, 114 (2000); *Peretz* v. *United States*, 501 U. S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver"). The presumption of waivability holds true for the right to counsel. This Court has held repeatedly that a defendant may waive that right, both at trial and at the entry of a guilty plea, so long as the waiver is knowing and intelligent. *Iowa* v. *Tovar*, 541 U. S. 77, 88 (2004); *Faretta* v. *California*, 422 U. S. 806, 835 (1975); *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465 (1938). Michigan seeks a waiver no more extensive than those this Court has already sanctioned at other stages of a criminal proceeding: It asks defendants convicted by plea to waive the right to appointed counsel on appeal.

There may be some nonwaivable rights: ones "so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts." *Mezzanatto*, *supra*, at 204 (internal quotation marks and brackets omitted). The right to appointed counsel on discretionary appeal from a guilty plea, however,

is not one of them. Even assuming that the assistance of appellate counsel enhances the reliability of the factfinding process by correcting errors in that process, it cannot possibly be so fundamental to the process that its absence "irreparably discredit[s]" the federal courts, particularly since the Constitution guarantees no right to an appeal at all, *e. g.*, *M. L. B.*, 519 U. S., at 110, 120. Furthermore, as I have explained, the record of a plea proceeding is fully adequate to enable discretionary review and, in turn, to permit the correction of errors in the factfinding process when necessary. *Supra*, at 634 (explaining that a plea-convicted defendant does not face a record unreviewed by counsel, and does not lack any reasoned treatment of his claims). And, finally, even if the reliability of the appellate process rather than the trial process is the relevant consideration here, the assistance of appellate counsel is not so fundamental to the appellate process that its absence deprives that process of meaning. *Supra*, at 629–630, 634–637. Cf. *Hill*, *supra*, at 116–117 (a constitutional protection may be waived even if it benefits society as well as criminal defendants).

Petitioner emphasizes the difficulty of the choice to which Michigan's statute puts criminal defendants: proceed to trial and guarantee the appointment of appellate counsel, or plead guilty and forgo that benefit. But this Court has repeatedly recognized that difficult choices are a necessary byproduct of the criminal justice system, and of plea bargaining in particular. See, *e. g.*, *Mezzanatto*, *supra*, at 210; *Brady* v. *United States*, 397 U. S. 742, 750 (1970). Michigan's waiver requires a choice no more demanding than others criminal defendants regularly face.

B

The majority maintains, first, that Halbert could not waive the right to appointed appellate counsel because Michigan law afforded him no such right to waive; second, in dictum, that the right cannot be waived; and, third, that even if the

right can be waived, Halbert did not knowingly and intelligently waive it here. The Court is wrong in each respect.

1

The majority claims that "[a]t the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo." *Ante*, at 623. This assertion apparently refers to the Michigan statute, Mich. Comp. Laws Ann. § 770.3a (West 2000). At the time of Halbert's plea, the statute provided that, if a defendant was convicted by plea, he generally could not receive appointed appellate counsel. The majority's reasoning is flawed for at least three reasons.

First, the statement that "Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel," *ante*, at 623, is either incorrect or irrelevant. If we view (as we must) the waiver decision from the perspective of Halbert and other defendants *before entering a plea*, the statement is wrong as a matter of Michigan law. The Michigan Court Rules applicable at the time of Halbert's plea explicitly provided that he was entitled to appointed appellate counsel if convicted following a trial. Mich. Ct. Rule 6.425(F)(1)(b) (Lexis 2001) ("In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right"). Michigan law thus gave Halbert, before entering a plea, the choice either to proceed to trial and guarantee himself appointed appellate counsel, or to plead guilty or no contest and forgo appointed appellate counsel in most circumstances.

Alternatively, by stating that "Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel," *ante*, at 623, the majority might mean that Michigan law afforded Halbert no right to appointed appellate counsel following a plea-based convic-

tion. If so, the statement is true but irrelevant. Of course Michigan law did not afford Halbert a right to appointed counsel once he pleaded no contest to the charged crimes. But the question is whether, by pleading no contest with knowledge of the condition (no paid counsel on appeal), Halbert accepted the condition and thereby waived his right to paid counsel on appeal. In other words, the question is whether Halbert had no right to counsel following his plea, because he had elected to forgo the right *by pleading*.

Second, even if the majority were correct about Michigan law, that is beside the point. At issue here is whether Halbert waived any federal constitutional right to appointed appellate counsel he might have enjoyed. Whether Michigan law provides for such counsel says nothing about whether a defendant possesses (and hence can waive) a federal constitutional right to that effect. That Michigan, as a matter of state law, prohibited Halbert from receiving appointed appellate counsel if he pleaded guilty or no contest is irrelevant to whether Halbert had (and could waive) an independent federal constitutional right to such counsel.

Third, the majority implies that if the existence of a right to paid appellate counsel had been something more than "no[t] recognized" at the time of Halbert's plea, then the right would have been waivable, *ibid.* What this cryptic statement means is unclear. But it cannot possibly mean that only rights that have been explicitly and uniformly recognized by statute or case law may be waived. If that is what the statement means, then the majority has outlawed all conditional waivers (ones in which a defendant agrees that, if he has such a right, he waives it).

I take it instead that the reference to rights that are something more than "no[t] recognized," and hence waivable, *ibid.*, means not just rights that are uniformly recognized, but also rights whose existence is unsettled. If this understanding of the majority's rule is correct, then the rule does not justify its claim that the constitutional right at issue was

wholly unrecognized. In fact, the existence of such a right was unsettled when Halbert entered his plea. By that date, November 7, 2001, the Michigan Supreme Court had issued *Bulger*, 462 Mich. 495, 614 N. W. 2d 103, sustaining over a vigorous dissent the practice of denying the appointment of appellate counsel on application for leave to appeal a plea-based conviction; and a Federal District Court had enjoined Michigan state judges from denying the appointment of appellate counsel to indigents pursuant to the state statute, on the ground that the statute was unconstitutional, *Tesmer* v. *Kowalski*, 114 F. Supp. 2d 622, 625–629 (ED Mich. 2000). The majority appears to focus on the fact that Michigan law did not afford defendants this right, but, again, state law is irrelevant to whether they possessed a federal constitutional right. The existence of that right was unsettled at the time of Halbert's plea; hence, on what I take to be the majority's own terms, the right should have been waivable.[2]

The majority attempts to deflect this criticism by saying that "nothing in Halbert's plea colloquy indicates that he waived an 'unsettled' . . . but assumed right to the assistance of appointed appellate counsel, postplea." *Ante*, at 623, n. 7. But any arguable inadequacy in the plea colloquy is a separate issue from, and is irrelevant to, the question at hand: whether the right was recognized, and hence waivable, by Halbert (or any other defendant deciding how to plead), irrespective of the content of the plea colloquy.

---

[2] Moreover, the majority's failure to make clear which sources of law are to be considered in deciding whether a right is "no[t] recognized," *ante*, at 623, and hence nonwaivable, is bound to wreak havoc. For instance, suppose that a defendant waived the right to appeal his sentence after the regional Court of Appeals had held that the principle of *Blakely* v. *Washington*, 542 U. S. 296 (2004), did not apply to the United States Sentencing Guidelines, but before this Court held the contrary in *United States* v. *Booker*, 543 U. S. 220 (2005). The defendant could claim that, in his circuit, the Sixth Amendment right against the application of the Guidelines was "no[t] recognized," and hence that the right was nonwaivable.

2

The majority compounds its error by expressing doubt in dictum that the right to appointed appellate counsel can be waived. *Ante*, at 624, n. 8. This ignores the well-established presumption of waivability, *e. g.*, *Mezzanatto*, 513 U. S., at 200–201; *Hill*, 528 U. S., at 114. By ignoring the presumption, the majority effectively reverses it, espousing an analysis that is "directly contrary to the approach we have taken in the context of a broad array of constitutional and statutory provisions." *Mezzanatto*, *supra*, at 200. For the proposition that Michigan's waiver requirement is unconstitutional, the majority cites *Douglas*, 372 U. S., at 357–358, and *M. L. B.*, 519 U. S., at 110–113, which explained that States cannot create unreasoned distinctions between indigent and moneyed defendants. *Ante*, at 624, n. 8. These cases have nothing to do with waiver; they determined only that certain rights existed, not that they both existed *and were nonwaivable.*

The majority seems to think that Michigan's waiver requirement arbitrarily distinguishes between indigents and more affluent persons. As I have explained, however, the statute does no such thing. Rather, it sensibly differentiates between defendants convicted at trial and defendants convicted by plea. *Supra*, at 614–615. The majority's dictum fails to persuade.

3

In this case, the plea colloquy shows that Halbert's waiver was knowing and intelligent, and that any deficiency in the plea colloquy was harmless. See 28 U. S. C. § 2111; cf. Fed. Rule Crim. Proc. 11(h). First, Halbert understood he was waiving any appeal as of right: The trial court asked Halbert, "You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right," and Halbert answered "Yes, sir." App. 22. Second, the court explained the statutory exceptions governing when counsel must or

might be appointed, and Halbert again indicated that he understood those conditions. *Ante*, at 629–630 (quoting colloquy). In context, the court's enumeration of the limited conditions in which counsel might be appointed informed Halbert that counsel would not be appointed in other circumstances. Third, at the end of the colloquy, the court asked counsel, "Any other promises or considerations I should be made aware of?" App. 24, and "Do counsel believe I've complied with the court rule regarding no contest pleas?" *id.*, at 25, both of which questions the prosecutor and defense attorney answered in the affirmative. Cf. *Bradshaw* v. *Stumpf*, *ante*, at 183 ("Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty"). Fourth, the court "f[ound] the plea understandingly made, voluntary and accurate." App. 25. There can be no serious claim that Halbert would have changed his plea had the court provided further information.

* * *

Today the Court confers on defendants convicted by plea a right nowhere to be found in the Constitution or this Court's cases. It does so at the expense of defendants whose claims are, on average, likely more meritorious. And it ignores that, even if such a right exists, it is fully waivable and was waived in this case. I respectfully dissent.

Syllabus

MAYLE, WARDEN *v.* FELIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–563. Argued April 19, 2005—Decided June 23, 2005

Respondent Felix was convicted of murder and robbery in California state court and sentenced to life imprisonment. His current application for federal habeas relief centers on two alleged trial-court errors, both involving the admission of out-of-court statements during the prosecutor's case in chief but otherwise unrelated. Felix had made inculpatory statements during pretrial police interrogation. He alleged that those statements were coerced, and that their admission violated his Fifth Amendment privilege against self-incrimination. He also alleged that the admission of a videotape recording of testimony of a prosecution witness violated the Sixth Amendment's Confrontation Clause.

Felix's conviction was affirmed on appeal and became final on August 12, 1997. Under the one-year limitation period imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2244(d)(1), Felix had until August 12, 1998, to file a habeas petition in federal court. On May 8, 1998, in a timely filed habeas petition, Felix asserted his Confrontation Clause challenge to admission of the videotaped prosecution witness testimony, but did not then challenge the admission of his own pretrial statements. On January 28, 1999, over five months after the August 12, 1998 expiration of AEDPA's time limit and eight months after the court appointed counsel to represent him, Felix filed an amended petition asserting a Fifth Amendment objection to admission of his pretrial statements. In response to the State's argument that the Fifth Amendment claim was time barred, Felix asserted the rule that pleading amendments relate back to the filing date of the original pleading when both the original plea and the amendment arise out of the same "conduct, transaction, or occurrence set forth . . . in the original pleading," Fed. Rule Civ. Proc. 15(c)(2). Because his Fifth Amendment and Confrontation Clause claims challenged the constitutionality of the same criminal conviction, Felix urged, both claims arose out of the same "conduct, transaction, or occurrence." The District Court dismissed the Fifth Amendment claim as time barred, and rejected the Confrontation Clause claim on its merits. The Ninth Circuit affirmed as to the latter claim, but reversed the dismissal of the coerced statements claim and remanded it for further proceedings. In the court's view, the relevant "transaction" for Rule 15(c)(2) purposes was

Syllabus

Felix's state-court trial and conviction. Defining transaction with greater specificity, the court reasoned, would unduly strain the meaning of "conduct, transaction, or occurrence" by dividing the trial and conviction into a series of individual occurrences.

Held: An amended habeas petition does not relate back (and thereby avoid AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading. Pp. 654–664.

(a) Under § 2244(d)(1), a one-year limitation period applies to a state prisoner's federal habeas application. Habeas Corpus Rule 11 permits application of the Federal Rules of Civil Procedure in habeas cases "to the extent [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules." Section 2242 provides that habeas applications "may be amended . . . as provided in the rules of procedure applicable to civil actions." Federal Rule of Civil Procedure 15(a) allows pleading amendments with "leave of court" any time during a proceeding. Before a responsive pleading is served, pleadings may be amended once as a "matter of course," *i. e.*, without seeking court leave. *Ibid.* Amendments made after the statute of limitations has run relate back to the date of the original pleading if the original and amended pleadings "ar[i]se out of the conduct, transaction, or occurrence." Rule 15(c)(2). The "original pleading" in a habeas proceeding is the petition as initially filed. That pleading must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." Habeas Corpus Rule 2(c). A prime purpose of Rule 2(c)'s demand that petitioners plead with particularity is to assist the district court in determining whether the State should be ordered to "show cause why the writ should not be granted," § 2243, or the petition instead should be summarily dismissed without ordering a responsive pleading. Habeas Corpus Rule 4. Pp. 654–656.

(b) Under the Ninth Circuit's comprehensive definition of "conduct, transaction, or occurrence," virtually any new claim introduced in an amended habeas petition will relate back, for federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence, and commonly attack proceedings anterior thereto. The majority of Circuits define "conduct, transaction, or occurrence" in federal habeas cases far less broadly, allowing relation back only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in both time and type from the originally raised episodes. Under that view, Felix's own pretrial statements, newly raised in his amended petition, would not relate back because they were separated in time and

type from the videotaped witness testimony. This Court is not aware, in the run-of-the-mine civil proceedings Rule 15 governs, of any reading of "conduct, transaction, or occurrence" as capacious as the Ninth Circuit's construction for habeas cases. Decisions applying Rule 15(c)(2) in the civil context illustrate that Rule 15(c)(2) relaxes, but does not obliterate, the statute of limitations; hence relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims. The Court disagrees with Felix's assertion that he seeks, and the Ninth Circuit accorded, no wider range for Rule 15(c)'s relation-back provision than was given the words "conduct, transaction, or occurrence" in *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 580–581. There, the amended complaint invoked a legal theory not suggested in the original complaint and relied on facts not originally asserted. Relation back was nevertheless permitted. In *Tiller*, however, there was but one "occurrence," the death of the petitioner's husband, which she attributed throughout to the respondent's failure to provide a safe workplace. In contrast, Felix targeted discrete episodes, the videotaped witness testimony in his original petition and his own interrogation at a different time and place in his amended petition. Pp. 656–660.

(c) Felix's contention that the trial itself is the appropriate "transaction" or "occurrence" artificially truncates his claims by homing in only on what makes those claims actionable in a habeas proceeding. Although his self-incrimination claim did not ripen until the prosecutor introduced his pretrial statements at trial, the essential predicate for his Fifth Amendment claim was an extrajudicial event, *i. e.*, an out-of-court police interrogation. The dispositive question in an adjudication of that claim would be the character of the police interrogation, specifically, did Felix answer voluntarily or were his statements coerced. See *Haynes* v. *Washington*, 373 U. S. 503, 513–514. Under Habeas Corpus Rule 2(c)'s particularity-in-pleading requirement, Felix's Confrontation Clause claim would be pleaded discretely, as would his self-incrimination claim. Each separate congeries of facts supporting the grounds for relief, the Rule suggests, would delineate an "occurrence." Felix's and the Ninth Circuit's approach is boundless by comparison, allowing a miscellany of claims for relief to be raised later rather than sooner and to relate back. If claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance. Pp. 660–663.

(d) Felix's argument that a firm check against petition amendments presenting new, discrete claims after AEDPA's limitation period has run is provided by Rule 15(a)—which gives district courts discretion to deny

petition amendments once a responsive pleading has been filed—overlooks a pleader's right to amend without leave of court "any time before a responsive pleading is served." That time can be long under Habeas Corpus Rule 4, pursuant to which a petition is not served until the judge first examines it to determine whether "it plainly appears . . . that the petitioner is not entitled to relief." This Court's reading that relation back will be in order so long as the original and amended petitions state claims that are tied to a common core of operative facts is consistent with Rule 15(c)(2)'s general application in civil cases, with Habeas Corpus Rule 2(c), and with AEDPA's tight time line for petitions. Pp. 663–664.

379 F. 3d 612, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 665.

Mathew Chan, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Mary Jo Graves*, Senior Assistant Attorney General, and *Janet E. Neeley* and *Ward A. Campbell*, Supervising Deputy Attorneys General.

Lisa S. Blatt argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, and *Richard A. Friedman*.

David M. Porter argued the cause and filed a brief for respondent.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Terry Goddard*, Attorney General of Arizona, *Mary O'Grady*, State Solicitor General, *Randall M. Howe*, Criminal Appeals Section Chief, *Michael O'Toole*, Assistant Attorney General, and *Dan Schweitzer*, by *Roberto J. Sánchez Ramos*, Secretary of Justice of Puerto Rico, by *Scott J. Nordstrand*, Acting Attorney General of Alaska, and by the Attorneys General for their respective States as follows: *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware,

JUSTICE GINSBURG delivered the opinion of the Court.

This case involves two federal prescriptions: the one-year limitation period imposed on federal habeas corpus petitioners by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(d)(1); and the rule that pleading amendments relate back to the filing date of the original pleading when both the original plea and the amendment arise out of the same "conduct, transaction, or occurrence," Fed. Rule Civ. Proc. 15(c)(2).

Jacoby Lee Felix, California prisoner and federal habeas petitioner, was convicted in California state court of first-degree murder and second-degree robbery, and received a life sentence. Within the one-year limitation period AEDPA allows for habeas petitions, Felix filed a *pro se* petition in federal court. He initially alleged, *inter alia*, that the admission into evidence of videotaped testimony of a witness for the prosecution violated his rights under the Sixth Amendment's Confrontation Clause. Five months after the expiration of AEDPA's time limit, and eight months after the federal court appointed counsel to represent him, Felix filed

---

Charles J. Crist, Jr., of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Judith Williams Jagdmann* of Virginia, *Rob McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* urging affirmance were filed for Albert Alschuler et al. by *Seth P. Waxman* and *David W. Ogden;* and for Professor Arthur R. Miller et al. by *Carter G. Phillips, Jeffrey T. Green,* and *Eric A. Shumsky.*

an amended petition in which he added a new claim for relief: He asserted that, in the course of pretrial interrogation, the police used coercive tactics to obtain damaging statements from him, and that admission of those statements at trial violated his Fifth Amendment right against self-incrimination. The question presented concerns the timeliness of Felix's Fifth Amendment claim.

In ordinary civil proceedings, the governing Rule, Rule 8 of the Federal Rules of Civil Procedure, requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Rule 2(c) of the Rules Governing Habeas Corpus Cases requires a more detailed statement. The habeas rule instructs the petitioner to "specify all the grounds for relief available to [him]" and to "state the facts supporting each ground."[1] By statute, Congress provided that a habeas petition "may be amended . . . as provided in the rules of procedure applicable to civil actions." 28 U. S. C. § 2242. The Civil Rule on amended pleadings, Rule 15 of the Federal Rules of Civil Procedure, instructs: "An amendment of a pleading relates back to the date of the original pleading when . . . the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. Rule Civ. Proc. 15(c)(2).

The issue before us is one on which federal appellate courts have divided: Whether, under Federal Rule of Civil Procedure 15(c)(2), Felix's amended petition, filed after AEDPA's one-year limitation and targeting his pretrial statements, relates back to the date of his original timely filed petition, which targeted the videotaped witness testimony. Felix urges, and the Court of Appeals held, that the

[1] The Habeas Corpus Rules were recently amended, effective December 1, 2004. Because the amended Rules are not materially different from those in effect when Felix filed his habeas petition, this opinion refers to the current version of the Rules.

amended petition qualifies for relation back because both the original petition and the amended pleading arose from the same trial and conviction. We reverse the Court of Appeals' judgment in this regard. An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.

I

In 1995, after a jury trial in Sacramento, California, respondent Jacoby Lee Felix was found guilty of murder and robbery stemming from his participation in a carjacking in which the driver of the car was shot and killed. App. E to Pet. for Cert. 2–7. He was sentenced to life imprisonment without the possibility of parole. App. C to Pet. for Cert. 1–2. The current controversy centers on two alleged errors at Felix's trial. Both involve the admission of out-of-court statements during the prosecutor's case in chief, but the two are otherwise unrelated. One prompted a Fifth Amendment self-incrimination objection originally raised in the trial court, the other, a Sixth Amendment Confrontation Clause challenge, also raised in the trial proceedings.

Felix's Fifth Amendment claim rested on the prosecution's introduction of statements Felix made during pretrial police interrogation. These statements were adduced at trial on direct examination of the investigating officer. Felix urged that the police used coercive tactics to elicit the statements. *Id.*, at 8–9. His Sixth Amendment claim related to the admission of the videotaped statements prosecution witness Kenneth Williams made at a jailhouse interview. The videotape records Williams, a friend of Felix, telling the police that he had overheard a conversation in which Felix described the planned robbery just before it occurred. When Williams testified at trial that he did not recall the police interview, the trial court determined that Williams' loss of

memory was feigned, and that the videotape was admissible because it contained prior inconsistent statements. App. E to Pet. for Cert. 10–13.

On direct appeal, Felix urged, *inter alia*, that the admission of Williams' videotaped statements violated Felix's constitutional right to confront the witnesses against him. He did not, however, argue that admission of his own pretrial statements violated his right to protection against self-incrimination. The intermediate appellate court affirmed Felix's conviction and sentence, *id.*, at 10–13, 17, and the California Supreme Court denied his petition for review, App. F to Pet. for Cert. 2. Felix's conviction became final on August 12, 1997. App. C to Pet. for Cert. 10.

Under AEDPA's one-year statute of limitations, Felix had until August 12, 1998, to file a petition for a writ of habeas corpus in federal district court. See § 2244(d)(1)(A). Within the one-year period, on May 8, 1998, he filed a *pro se* petition for federal habeas relief. Felix's federal petition repeated his Sixth Amendment objection to the admission of the Williams videotape, but he again failed to reassert the objection he made in the trial court to the admission of his own pretrial statements. App. G to Pet. for Cert. 1–7. On May 29, 1998, a Magistrate Judge appointed counsel to represent Felix. App. C to Pet. for Cert. 6; App. H to Pet. for Cert. 2. Thereafter, on September 15, 1998, the Magistrate Judge ordered Felix to file an amended petition within 30 days. *Id.*, at 3. On Felix's unopposed requests, that period was successively extended. *Id.*, at 4–5. Pending the filing of an amended petition, the State was not required to interpose an answer.

On January 28, 1999, over five months after the August 12, 1998 expiration of AEDPA's time limit, and eight months after the appointment of counsel to represent him, Felix filed an amended petition. *Id.*, at 5. In this pleading, he reasserted his Confrontation Clause claim, and also asserted, for the first time post-trial, that his own pretrial statements to

the police were coerced and therefore inadmissible at trial. App. I to Pet. for Cert. 4. Further, he alleged that his counsel on appeal to the California intermediate appellate court was ineffective in failing to raise the coerced confession claim on direct appeal. *Id.*, at 18–19.[2] In its answer to the amended petition, the State asserted that the Fifth Amendment claim was time barred because it was initially raised after the expiration of AEDPA's one-year limitation period. Felix argued in response that the new claim related back to the date of his original petition. Because both Fifth Amendment and Confrontation Clause claims challenged the constitutionality of the same criminal conviction, Felix urged, the Fifth Amendment claim arose out of the "conduct, transaction, or occurrence set forth . . . in the original pleading," Fed. Rule Civ. Proc. 15(c)(2). App. C to Pet. for Cert. 16.

The Magistrate Judge recommended dismissal of Felix's Fifth Amendment coerced statements claim. Relation back was not in order, the Magistrate said, because Felix's "allegedly involuntary statements to police d[id] not arise out of the same conduct, transaction or occurrence as the videotaped interrogation of [prosecution witness] Kenneth Williams." *Ibid.* It did not suffice, the Magistrate observed, that Felix's Fifth and Sixth Amendment claims attack the same criminal conviction. *Ibid.* Adopting the Magistrate Judge's report and recommendation in full, the District

---

[2] Because Felix had not presented his coerced statements Fifth Amendment claim on appeal to the California courts, the State moved to dismiss the amended petition on the ground that it contained both exhausted and unexhausted claims. See 28 U. S. C. § 2254(b)(1)(A); Brief for Respondent 6–7. Before the Magistrate Judge acted on the motion, Felix presented the coerced statements/ineffective-assistance claim to the California Supreme Court in a habeas petition. Opposition to Respondents' Motion to Dismiss in No. Civ. S–98–0828 WBS GGH P (ED Cal.), p. 3. After that court denied the petition without comment, the State withdrew its motion to dismiss. See Request to Vacate Hearing on Motion to Dismiss in No. Civ. S–98–0828 WBS GGH P (ED Cal.), pp. 1–2.

Court dismissed the Fifth Amendment claim as time barred, and rejected the Confrontation Clause claim on its merits. App. B to Pet. for Cert. 1–3.

A divided panel of the Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal of Felix's Confrontation Clause claim, but reversed the dismissal of his coerced statements claim and remanded that claim for further proceedings. 379 F. 3d 612 (2004). In the majority's view, the relevant "transaction" for purposes of Rule 15(c)(2) was Felix's "trial and conviction in state court." *Id.*, at 615. Defining the transaction at any greater level of specificity, the majority reasoned, would "unduly strai[n] the usual meaning of 'conduct, transaction, or occurrence' " by dividing the "trial and conviction [into] a series of perhaps hundreds of individual occurrences." *Ibid.* Judge Tallman concurred in part and dissented in part. In his view, defining "conduct, transaction, or occurrence" under Rule 15(c)(2) "so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition" would "obliterat[e] AEDPA's one year statute of limitation." *Id.*, at 618. "While an amendment offered to clarify or amplify the facts already alleged in support of a timely claim may relate back," he reasoned, "an amendment that introduces a new legal theory based on facts different from those underlying the timely claim may not." *Id.*, at 621.

We granted certiorari, 543 U. S. 1042 (2005), to resolve the conflict among Courts of Appeals on relation back of habeas petition amendments. Compare 379 F. 3d, at 614 (if original petition is timely filed, amendments referring to the same trial and conviction may relate back); *Ellzey* v. *United States*, 324 F. 3d 521, 525–527 (CA7 2003) (same), with *United States* v. *Hicks*, 283 F. 3d 380, 388–389 (CADC 2002) (relevant transaction must be defined more narrowly than the trial and conviction); *United States* v. *Espinoza-Saenz*, 235 F. 3d 501, 503–505 (CA10 2000) (same); *Davenport* v. *United States*, 217 F. 3d 1341, 1344–1346 (CA11 2000) (same); *United States* v.

Pittman, 209 F. 3d 314, 317–318 (CA4 2000) (same); *United States* v. *Duffus*, 174 F. 3d 333, 337 (CA3 1999) (same); *United States* v. *Craycraft*, 167 F. 3d 451, 457 (CA8 1999) (same). We now reverse the Ninth Circuit's judgment to the extent that it allowed relation back of Felix's Fifth Amendment claim.

II

A

In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction. Section 2244(d)(1) provides: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." See also § 2255, ¶ 6 (providing one-year limitation period in which to file a motion to vacate a federal conviction).[3]

A discrete set of Rules governs federal habeas proceedings launched by state prisoners. See Rules Governing Section 2254 Cases in the United States District Courts.[4] The last of those Rules, Habeas Corpus Rule 11, permits application of the Federal Rules of Civil Procedure in habeas cases "to the extent that [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules." See also Fed. Rule Civ. Proc. 81(a)(2) (The civil rules "are applicable to proceedings for . . . habeas corpus."). Rule 11, the Advisory Committee's Notes caution, "permits application of the civil rules only when it would be appropriate to do so," and would not be "inconsistent or inequitable in the overall framework of habeas corpus." Advisory Committee's Note on Habeas Corpus Rule 11, 28 U. S. C., p. 480. In addition to the general prescriptions on application of the civil rules in federal

---

[3] Section 2255 establishes a separate avenue for postconviction challenges to federal, as opposed to state, convictions.

[4] Habeas corpus proceedings are characterized as civil in nature. See, *e. g.*, *Fisher* v. *Baker*, 203 U. S. 174, 181 (1906).

habeas cases, § 2242 specifically provides that habeas applications "may be amended . . . as provided in the rules of procedure applicable to civil actions."

The Civil Rule governing pleading amendments, Federal Rule of Civil Procedure 15, made applicable to habeas proceedings by § 2242, Federal Rule of Civil Procedure 81(a)(2), and Habeas Corpus Rule 11, allows pleading amendments with "leave of court" any time during a proceeding. See Fed. Rule Civ. Proc. 15(a). Before a responsive pleading is served, pleadings may be amended once as a "matter of course," *i. e.*, without seeking court leave. *Ibid.* Amendments made after the statute of limitations has run relate back to the date of the original pleading if the original and amended pleadings "ar[i]se out of the conduct, transaction, or occurrence." Rule 15(c)(2).

The "original pleading" to which Rule 15 refers is the complaint in an ordinary civil case, and the petition in a habeas proceeding. Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). Habeas Corpus Rule 2(c) is more demanding. It provides that the petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." See also Advisory Committee's Note on subd. (c) of Habeas Corpus Rule 2, 28 U. S. C., p. 469 ("In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important . . . ."); Advisory Committee's Note on Habeas Corpus Rule 4, 28 U. S. C., p. 471 ("'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (internal quotation marks omitted)). Accordingly, the model form available to aid prisoners in filing their habeas petitions instructs in boldface:

> "**CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**" Petition for Relief From a Conviction or Sentence By a Person in State Custody, Habeas Corpus Rules, Forms App., 28 U. S. C., p. 685 (2000 ed., Supp. V) (emphasis in original).

A prime purpose of Rule 2(c)'s demand that habeas petitioners plead with particularity is to assist the district court in determining whether the State should be ordered to "show cause why the writ should not be granted." § 2243. Under Habeas Corpus Rule 4, if "it plainly appears from the petition . . . that the petitioner is not entitled to relief in the district court," the court must summarily dismiss the petition without ordering a responsive pleading. If the court orders the State to file an answer, that pleading must "address the allegations in the petition." Rule 5(b).

B

This case turns on the meaning of Federal Rule of Civil Procedure 15(c)(2)'s relation-back provision in the context of federal habeas proceedings and AEDPA's one-year statute of limitations. Rule 15(c)(2), as earlier stated, provides that pleading amendments relate back to the date of the original pleading when the claim asserted in the amended plea "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The key words are "conduct, transaction, or occurrence." The Ninth Circuit, whose judgment we here review, in accord with the Seventh Circuit, defines those words to allow relation back of a claim first asserted in an amended petition, so long as the new claim stems from the habeas petitioner's trial, conviction, or sentence. Under that comprehensive definition,

virtually any new claim introduced in an amended petition will relate back, for federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence, and commonly attack proceedings anterior thereto. See *Espinoza-Saenz*, 235 F. 3d, at 505 (A "majority of amendments" to habeas petitions raise issues falling under the "broad umbrella" of "a defendant's trial and sentencing."); *Hicks*, 283 F. 3d, at 388.

The majority of Circuits, mindful of "Congress' decision to expedite collateral attacks by placing stringent time restrictions on [them]," *ibid.*, define "conduct, transaction, or occurrence" in federal habeas cases less broadly. See *id.*, at 388–389; *Espinoza-Saenz*, 235 F. 3d, at 503–505; *Davenport*, 217 F. 3d, at 1344–1346; *Pittman*, 209 F. 3d, at 317–318; *Duffus*, 174 F. 3d, at 337; *Craycraft*, 167 F. 3d, at 457. They allow relation back only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in "both time and type" from the originally raised episodes. *Ibid.* Because Felix's own pretrial statements, newly raised in his amended petition, were separated in time and type from witness Williams' videotaped statements, raised in Felix's original petition, the former would not relate back under the definition of "conduct, transaction, or occurrence" to which most Circuits adhere.

We are not aware, in the run-of-the-mine civil proceedings Rule 15 governs, of any reading of "conduct, transaction, or occurrence" as capacious as the construction the Ninth and Seventh Circuits have adopted for habeas cases. Compare *Maegdlin* v. *International Assn. of Machinists and Aerospace Workers*, 309 F. 3d 1051, 1052 (CA8 2002) (allowing relation back where original complaint alleged that defendant union had breached its duty of fair representation by inadequately representing plaintiff because of his gender, and amended complaint asserted a Title VII gender discrimination claim based on the same differential treatment); *Clip-*

per Exxpress v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F. 2d 1240, 1246, 1259, n. 29 (CA9 1982) (claim asserting that defendant included fraudulent information in rate protests filed with the Interstate Commerce Commission related back to original complaint, which asserted that defendant filed the same rate protests "for the purpose of . . . restricting . . . competition" (internal quotation marks omitted));[5] *Santana* v. *Holiday Inns, Inc.*, 686 F. 2d 736, 738 (CA9 1982) (original complaint alleging slander and amendment alleging interference with employment relations arose out of the same conduct or occurrence because both were based on defendant's making allegedly untruthful statements about plaintiff's behavior to plaintiff's employer); *Rural Fire Protection Co.* v. *Hepp*, 366 F. 2d 355, 361–362 (CA9 1966) (in a Fair Labor Standards Act of 1938 suit alleging minimum wage violations for certain pay periods, amendment asserting the same type of violation during an additional pay period related back), with *Nettis* v. *Levitt*, 241 F. 3d 186, 193 (CA2 2001) (disallowing relation back where Nettis' original complaint alleged that his employer retaliated in response to Nettis' objections to employer's sales tax collection procedure, and amendment alleged retaliation for Nettis' report of payroll and inventory irregularities); *In re Coastal Plains, Inc.*, 179 F. 3d 197, 216 (CA5 1999) (Coastal Plains's claim that creditor interfered with business relations by attempt-

---

[5] The dissent asserts that *Clipper Exxpress* is comparable to this case in according Rule 15(c)(2) a "'capacious'" reading. *Post*, at 668, n. 2. *Clipper Exxpress* involved a series of allegedly sham protests, commonly designed to restrain trade, a charge of the pattern or practice type. The amendment in question added a fraud charge, a new legal theory tied to the same operative facts as those initially alleged. 690 F. 2d, at 1259, n. 29. That unremarkable application of the relation-back rule bears little resemblance to the argument made by Felix and embraced by the dissent—that all manner of factually and temporally unrelated conduct may be raised after the statute of limitations has run and relate back, so long as the new and originally pleaded claims challenge the same conviction. See *infra*, at 659–661.

ing to sell Coastal Plains to a third party did not relate back to claim based on creditor's failure to return inventory to Coastal Plains, even though both claims were linked to creditor's alleged "broader plan to destroy Coastal [Plains]"); *Sierra Club* v. *Penfold*, 857 F. 2d 1307, 1315–1316 (CA9 1988) (where original complaint challenged the manner in which an agency applied a regulation, an amendment challenging the agency's "conduct in adopting the regulatio[n]" did not relate back). See also *Jackson* v. *Suffolk County Homicide Bureau*, 135 F. 3d 254, 256 (CA2 1998) (although all of plaintiff's 42 U. S. C. § 1983 claims arose out of a single state-court criminal proceeding, plaintiff's First Amendment claims did not arise out of the same conduct as the originally asserted excessive force claims, and therefore did not relate back). As these decisions illustrate, Rule 15(c)(2) relaxes, but does not obliterate, the statute of limitations; hence relation back depends on the existence of a common "core of operative facts" uniting the original and newly asserted claims. See *Clipper Exxpress*, 690 F. 2d, at 1259, n. 29; 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1497, p. 85 (2d ed. 1990).

Felix asserts that he seeks, and the Ninth Circuit accorded, no wider range for Rule 15(c)'s relation-back provision than this Court gave to the Rule's key words "conduct, transaction, or occurrence" in *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 580–581 (1945). We disagree. In *Tiller*, a railroad worker was struck and killed by a railroad car. His widow sued under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, to recover for his wrongful death. She initially alleged various negligent acts. In an amended complaint, she added a claim under the Federal Boiler Inspection Act for failure to provide the train's locomotive with a rear light. We held that the amendment related back, and therefore avoided a statute of limitations bar, even though the amendment invoked a legal theory not suggested by the original complaint and relied on facts not originally asserted.

There was but one episode-in-suit in *Tiller*, a worker's death attributed from the start to the railroad's failure to provide its employee with a reasonably safe place to work. The federal rulemakers recognized that personal injury plaintiffs often cannot pinpoint the precise cause of an injury prior to discovery. See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1215, pp. 138–143 (2d ed. 1990). They therefore included in the Appendix to the Federal Rules an illustrative form indicating that a personal injury plaintiff could adequately state a claim for relief simply by alleging that the defendant negligently operated a certain instrumentality at a particular time and place. See Form 9, Complaint for Negligence, Forms App., Fed. Rule Civ. Proc., 28 U. S. C. App., p. 829. The widow in *Tiller* met that measure. She based her complaint on a single "occurrence," an accident resulting in her husband's death. In contrast, Felix targeted separate episodes, the pretrial police interrogation of witness Williams in his original petition and his own interrogation at a different time and place in his amended petition.

Felix contends, however, that his amended petition qualifies for relation back because the trial itself is the "transaction" or "occurrence" that counts. See Brief for Respondent 21–23. Citing *Chavez* v. *Martinez*, 538 U. S. 760 (2003) (plurality opinion), Felix urges that neither the videotaped interview with witness Williams nor the pretrial police interrogation to which Felix himself was exposed transgressed any constitutional limitation. Until the statements elicited by the police were introduced at trial, Felix argues, he had no actionable claim at all. Both the confrontation right he timely presented and the privilege against self-incrimination he asserted in his amended petition are "trial right[s]," Felix underscores. Brief for Respondent 21 (emphasis deleted). His claims based on those rights, he maintains, are not "separate," *id.*, at 22; rather, they are related in time and type, for "they arose on successive days during the trial and both

challenged [on constitutional grounds] admission of pretrial statements," *id.*, at 22–23.

Felix artificially truncates his claims by homing in only on what makes them actionable in a habeas proceeding. We do not here question his assertion that his Fifth Amendment right did not ripen until his statements were admitted against him at trial. See *Chavez*, 538 U. S., at 766–767. Even so, the essential predicate for his self-incrimination claim was an extrajudicial event, *i. e.*, an out-of-court police interrogation. The dispositive question in an adjudication of that claim would be the character of Felix's conduct, not in court, but at the police interrogation, specifically, did he answer voluntarily or were his statements coerced. See *Haynes* v. *Washington*, 373 U. S. 503, 513–514 (1963) (voluntariness is evaluated by examining the "totality of circumstances" surrounding the "making and signing of the challenged confession").

Habeas Corpus Rule 2(c), we earlier noted, see *supra*, at 655–656, instructs petitioners to "specify all [available] grounds for relief" and to "state the facts supporting each ground." Under that Rule, Felix's Confrontation Clause claim would be pleaded discretely, as would his self-incrimination claim. Each separate congeries of facts supporting the grounds for relief, the Rule suggests, would delineate an "occurrence." Felix's approach, the approach that prevailed in the Ninth Circuit, is boundless by comparison. A miscellany of claims for relief could be raised later rather than sooner and relate back, for "conduct, transaction, or occurrence" would be defined to encompass any pretrial, trial, or post-trial error that could provide a basis for challenging the conviction. An approach of that breadth, as the Fourth Circuit observed, "views 'occurrence' at too high a level of generality." *Pittman*, 209 F. 3d, at 318.[6]

[6]The dissent builds a complex discussion on an apparent assumption that claim preclusion operates in habeas cases largely as it does in mine-run civil cases. See *post*, at 673–674. Ironically, few habeas petitions

Congress enacted AEDPA to advance the finality of criminal convictions. See *Rhines* v. *Weber*, 544 U. S. 269, 276 (2005). To that end, it adopted a tight time line, a one-year limitation period ordinarily running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U. S. C. §2244(d)(1)(A). If claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance. See 379 F. 3d, at 619 (Tallman, J., concurring in part and dissenting in part) (Ninth Circuit's rule would permit "the 'relation back' doctrine to swallow AEDPA's statute of limitation"); *Pittman*, 209 F. 3d, at 318 ("If we were to craft such a rule, it would mean that amendments . . . would almost invariably be allowed even after the statute of limitations had expired, because most [habeas] claims arise from a criminal defendant's underlying conviction and sentence."); *Duffus*, 174 F. 3d, at 338 ("A prisoner should not be able to assert a claim otherwise barred by the statute of limitations merely because he asserted a separate claim within the limitations period."). The very purpose of Rule 15(c)(2), as the dissent notes, is to "qualify a statute of limitations." *Post*, at 666.

---

would survive swift dismissal were that so, for the very objective of the petition is to undo a final judgment after direct appeals have been exhausted or are time barred. On judicial and legislative development of standards governing successive habeas petitions, standards that do not track the Restatement of Judgments, see *Schlup* v. *Delo*, 513 U. S. 298, 317–320 (1995); 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure §28.2b, pp. 1270–1275 (4th ed. 2001); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1113, 1148–1154 (1970). The dissent would read Rule 15(c)(2)'s words, "conduct, transaction, or occurrence," into AEDPA's provisions governing second or successive petitions and motions (28 U. S. C. §§2244(b) and 2255, ¶8), although Congress did not put those words there. Nor is there any other reason to believe that Congress designed AEDPA's confinement of successive petitions and motions with a view to the relation-back concept employed in Rule 15(c)(2).

But "qualify" does not mean repeal. See *Fuller* v. *Marx*, 724 F. 2d 717, 720 (CA8 1984). Given AEDPA's "finality" and "federalism" concerns, see *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000); *Hicks*, 283 F. 3d, at 389, it would be anomalous to allow relation back under Rule 15(c)(2) based on a broader reading of the words "conduct, transaction, or occurrence" in federal habeas proceedings than in ordinary civil litigation, see *supra*, at 657–659.

Felix urges that an unconstrained reading of Rule 15(c)(2) is not problematic because Rule 15(a) arms district courts with "ample power" to deny leave to amend when justice so requires. See Brief for Respondent 31–33. Under that Rule, once a responsive pleading has been filed, a prisoner may amend the petition "only by leave of court or by written consent of the adverse party." Rule 15(a); see *Ellzey* v. *United States*, 324 F. 3d, at 526 (AEDPA's aim to "expedite resolution of collateral attacks . . . should influence the exercise of discretion under Rule 15(a)—which gives the district judge the right to disapprove proposed amendments that would unduly prolong or complicate the case."). This argument overlooks a pleader's right to amend without leave of court "any time before a responsive pleading is served." Rule 15(a). In federal habeas cases that time can be rather long, as indeed it was in the instant case. See *supra*, at 651. Under Habeas Corpus Rule 4, a petition is not immediately served on the respondent. The judge first examines the pleading to determine whether "it plainly appears . . . that the petitioner is not entitled to relief." Only if the petition survives that preliminary inspection will the judge "order the respondent to file an answer." In the interim, the petitioner may amend his pleading "as a matter of course," as Felix did in this very case. Rule 15(a). Accordingly, we do not regard Rule 15(a) as a firm check against petition amendments that present new claims dependent upon discrete facts after AEDPA's limitation period has run.

Our rejection of Felix's translation of same "conduct, transaction, or occurrence" to mean same "trial, conviction, or sentence" scarcely leaves Rule 15(c)(2) "meaningless in the habeas context," 379 F. 3d, at 615. So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order.[7] Our reading is consistent with the general application of Rule 15(c)(2) in civil cases, see *supra*, at 657–659, with Habeas Corpus Rule 2(c), see *supra*, at 655–656, and with AEDPA's installation of a tight time line for § 2254 petitions, see *supra*, at 662–663.[8]

---

[7] For example, in *Mandacina* v. *United States*, 328 F. 3d 995, 1000–1001 (CA8 2003), the original petition alleged violations of *Brady* v. *Maryland*, 373 U. S. 83 (1963), while the amended petition alleged the Government's failure to disclose a particular report. Both pleadings related to evidence obtained at the same time by the same police department. The Court of Appeals approved relation back. And in *Woodward* v. *Williams*, 263 F. 3d 1135, 1142 (CA10 2001), the appeals court upheld relation back where the original petition challenged the trial court's admission of recanted statements, while the amended petition challenged the court's refusal to allow the defendant to show that the statements had been recanted. See also 3 J. Moore et al., Moore's Federal Practice § 15.19[2], p. 15–82 (3d ed. 2004) (relation back ordinarily allowed "when the new claim is based on the same facts as the original pleading and only changes the legal theory").

[8] The dissent is concerned that our decision "creates an unfair disparity between indigent habeas petitioners and those able to afford their own counsel." *Post*, at 665; see *post*, at 675 ("[T]oday's decision . . . will fall most heavily on the shoulders of indigent habeas petitioners who can afford no counsel without the assistance of the court."). The concern is understandable, although we note that in Felix's case, counsel was appointed, and had some two and a half months to amend the petition before AEDPA's limitation period expired. See *supra*, at 651. That was ample time to add a claim based on the alleged pretrial extraction of damaging statements from Felix. Ordinarily, as we observed in *Halbert* v. *Michigan*, *ante*, at 624, n. 8, the government (federal or state) "'need not equalize economic conditions' between criminal defendants of lesser and greater wealth" (quoting *Griffin* v. *Illinois*, 351 U. S. 12, 23 (1956) (Frankfurter, J., concurring in judgment)); see *Pennsylvania* v. *Finley*, 481 U. S. 551, 557 (1987) (holding that States need not provide appointed counsel in post-conviction proceedings). This case, it is inescapably true, does not fit

* * *

As to the question presented, for the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, dissenting.

This case requires the Court to decide how the relation back provision of Rule 15(c)(2) of the Federal Rules of Civil Procedure ought to apply in federal habeas corpus cases, when neither text nor precedent provides clear guidance. I see nothing in habeas law or practice that calls for the Court's narrow construction of the rule, and good reasons to go the other way, including the unfortunate consequence that the Court's view creates an unfair disparity between indigent habeas petitioners and those able to afford their own counsel. I respectfully dissent.

I

At the outset, there is need for care in understanding the narrow scope of the problem this case presents. A habeas petitioner's opportunity to amend as a matter of course, without permission of the trial court, exists only before the responsive pleading is served, and even then only once. Rule 15(a). After one amendment, or after the government files the answer or other response, assuming one is even required, see Habeas Corpus Rule 4, the prisoner may not amend without the court's leave or the government's consent, Fed. Rule Civ. Proc. 15(a). While leave to amend "shall be freely given when justice so requires," *ibid.*, justice does,

---

within the confined circumstances in which our decisions require appointment of counsel for an indigent litigant at a critical stage to ensure his meaningful access to justice. See *Halbert*, *ante*, at 610–612, 624, n. 8.

after all, have to require it, and the District Courts will presumably say no, for example, in the face of unjustifiable delay or threatened prejudice to the State. See *Foman* v. *Davis*, 371 U. S. 178, 182 (1962); see also Brief for Professor Arthur R. Miller et al. as *Amici Curiae* 20–21 (describing reasons courts regularly deny leave to amend and citing cases); 6 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §§ 1487–1488 (2d ed. 1990) (hereinafter Wright & Miller) (discussing reasons leave to amend may be and often is denied, including delay and prejudice). The Court's concern for "unconstrained" recourse to petition amendments, *ante*, at 663, is thus misplaced.

The limited opportunity to amend also supplies perspective on the claim that Felix's reading of the relation back rule would undermine the 1-year limitation period of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the statute's concomitant concern for finality of judgments. See *ante*, at 662, 663. In fact, AEDPA's objectives bear little weight in the analysis, because the very point of every relation back rule is to qualify a statute of limitations, and Rule 15(c) "is based on the notion that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." 6A Wright & Miller § 1496, at 64. AEDPA's statute of limitations, like any other, may be trumped by relating back when the subject of the amendment arises out of the same conduct, transaction, or occurrence described in the original pleading, but that alone does not help us figure out what conduct, transaction, or occurrence is the same.

II

Felix's disputed right to amend with relation back effect turns entirely, as the Court says, *ante*, at 656, on how nar-

rowly or how broadly the tripartite authorization for relation back ought to be construed: whether the relevant "conduct, transaction, or occurrence"[1] to which a habeas petition refers includes the underlying trial (which resulted in the custody being challenged) or is limited to the set of facts underlying each trial ruling claimed to be constitutionally defective (in this case, the unconfronted videotaped testimony and the interrogation that produced the incriminating statement). If the former, a habeas petitioner will have the benefit of relation back for any amendment raising trial error, subject to the district judge's discretion to deny leave except for the one amendment of right; if the latter, a petitioner is effectively precluded from making any amendment unless a single trial ruling amounts to distinct errors or an underlying fact is the subject of distinct rulings, notwithstanding Congress's evident intent to provide relation back in habeas proceedings, see 28 U. S. C. § 2242; Fed. Rule Civ. Proc. 81(a)(2); Habeas Corpus Rule 11.

The text alone does not tell us the answer, for either the facts specific to the claim or the trial as a whole could be the relevant "conduct, transaction, or occurrence." The Court assumes that the former approach is correct and then proceeds to explain, based on that assumption, the infirmity of a contrary approach. For example, the Court asserts that under Felix's rule, "all manner of factually and temporally unrelated conduct may be raised after the statute of limitations has run . . . ." *Ante*, at 658, n. 5. But in saying this the Court presumes that the relevant transaction is what occurred outside the courtroom. Felix's entire argument is that the proper transaction is instead what occurred in court, namely, the imposition of the conviction that justifies the challenged custody. If he is right, then the Court's assertion is incorrect, for what Felix seeks to add is a claim not about

[1] There is a tendency toward the gestalt in reading the phrase, but the three items are distinct, and a party claiming the benefit of the rule need satisfy only one.

"factually and temporally unrelated conduct," *ibid.*, but about conduct that occurred at the same trial as the conduct addressed in the initial petition. That newly addressed conduct will hardly be "temporally unrelated" to what was previously targeted; it likely will have occurred on the same day of trial as the original conduct or within a few days. Nor will it be "factually . . . unrelated" to the previously raised in-court conduct, for it will almost certainly involve the same judge, the same parties and attorneys, the same courtroom, and the same jurors. Again, my point is just that much of the Court's argument lacks force because it assumes that the proper transaction is what occurred outside the courtroom rather than inside, when that is the question we must answer.

The Court also cautions that "it would be anomalous to allow relation back under Rule 15(c)(2) based on a broader reading of the words 'conduct, transaction, or occurrence' in federal habeas proceedings than in ordinary civil litigation." *Ante*, at 663. The cases the Court cites to establish the scope of civil relation back, however, see *ante*, at 657–660, simply stand for the proposition that an amendment relates back only if it deals with the same conduct, transaction, or occurrence. Felix does not purport to claim anything more.[2]

---

[2] In any event, it is not clear why it is more "capacious," *ante*, at 657, to regard a single trial lasting days or weeks as one transaction or occurrence than it is, for example, to view numerous separate protests filed with the Interstate Commerce Commission over a period of two years (each in response to a different proposed tariff amendment) as one transaction or occurrence, see *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F. 2d 1240, 1260, n. 29 (CA9 1982) ("The protests involve a single transaction or occurrence" (emphasis deleted)), cited *ante*, at 657–658.

The Court responds that in *Clipper Exxpress* the amendment was "tied to the same operative facts as those initially alleged." *Ante*, at 658, n. 5. But as just noted, those "operative facts" (*i. e.*, the relevant transaction) consisted of a number of separate protests filed with the Interstate Commerce Commission over a period of two years, each in response to a different proposed tariff amendment. This is, to say the least, a rather expansive transaction, much more so in my view than a single trial involving

At first glance, an argument for the narrow reading urged by petitioner Mayle inheres in the distinctive pleading requirement for habeas petitions. Unlike the generous notice-pleading standard for the benefit of ordinary civil plaintiffs under Federal Rule of Civil Procedure 8(a), see *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957), Habeas Corpus Rule 2(c) requires habeas petitioners to "specify all the grounds for relief available," and to "state the facts supporting each ground." The Court implies that because pleading must be factually specific, the "conduct, transaction, or occurrence" of Federal Rule of Civil Procedure 15(c) must be specifically factual to a parallel degree; as the Court puts it, a habeas petitioner will plead claims "discretely," *ante*, at 661, such that each ground for relief "would delineate an 'occurrence,'" *ibid.* But this does not follow; all that follows from "discret[e]" pleading is that each claim would delineate a separate ground for relief, whatever may be the conduct, transaction, or occurrence out of which the claims arise. As *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574 (1945), and the other civil cases the Court cites demonstrate, see *ante*, at 657–660, relation back is regularly allowed when an amendment raises a separate claim for relief arising out of the same transaction or occurrence, no matter how discretely that claim might be stated. Indeed, this is what the text anticipates; Rule 15(c)(2) permits relation back when "the claim or defense" asserted in the amendment arises out of the same conduct, transaction, or occurrence set forth in the original pleading. That is, the same conduct, transaction, or occurrence can support multiple, discrete claims for relief.

Nor is there any policy underlying the particular habeas pleading rule that requires a more grudging relation back standard. As the Court concedes, *ante*, at 656, the purpose of the heightened pleading standard in habeas cases is to help a district court weed out frivolous petitions before call-

---

(for all claims stemming from it) the same judge, the same parties, the same attorneys, the same jury, the same indictment, and so on.

ing upon the State to answer. See Advisory Committee's Note on Habeas Corpus Rule 2, 28 U. S. C., p. 469; Advisory Committee's Note on Rule 4, *id.*, at 471 ("[I]t is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer"); 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 11.6, p. 573, n. 3 (4th ed. 2001) (hereinafter Hertz & Liebman) ("[F]act pleading, like other habeas corpus rules and practices, enables courts . . . to separate substantial petitions from insubstantial ones quickly and without need of adversary proceedings"); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1175 (1970) ("The justification for stringent pleading requirements in habeas corpus is thought to lie in the need to protect the courts from the burden of entertaining frivolous applications"). Identifying meritless claims has nothing to do with the effect of amendment to initial petitions for relief, except in the remote sense that an amendment will require a district judge to examine one more item. But there is no claim here that Federal Rule of Civil Procedure 15(c) has to be narrow to protect judges; the government is objecting because it wants fewer claims to defend, and that objection is unrelated to the habeas fact-pleading standard.[3]

While considerations based on habeas pleading fail to pan out with support for Mayle's restricted reading of Rule 15(c), several reasons convince me that Felix's reading is right. Most obvious is the fact that both of his claims can easily fit within the same "transaction or occurrence," understood as

---

[3] Neither does the warning on the model habeas petition (that failure to set forth every ground for relief may preclude the presentation of additional grounds later) tell us anything about relation back. The Court implies that it does, *ante*, at 655–656, but the language on the form says nothing about relation back, and if the Court's implication were correct then the warning would also bar amendments filed within the limitation period.

a trial ending in conviction resulting in a single ultimate injury of unlawful custody. ("Conduct" sounds closer to underlying facts, perhaps, but Rule 15(c) turns on either conduct, transaction, or occurrence.) The Court acknowledges that Felix's claims regarding his own interrogation and the videotaped testimony of witness Kenneth Williams are potentially actionable here only because the resulting incriminating statements were introduced at trial, *ante*, at 661, but argues that they nevertheless arise out of separate transactions or occurrences because they rest on distinct "essential predicate[s]," *ibid.*, meaning pretrial acts. It is certainly true that the claims depend on those distinct pretrial acts, but the claims depend equally on the specified trial errors, without which there would be no habeas claim: without the introduction of each set of statements at trial, Felix would have no argument for habeas relief, regardless of what happened outside of court.[4] The Court's own opinion demonstrates this, as its descriptions of Felix's two claims refer not only to what happened outside court but also to what happened at trial, and they specifically ground the alleged constitutional violations on the latter. See *ante*, at 648 ("He initially alleged . . . that the admission into evidence of videotaped testimony of a witness for the prosecution violated his rights under the Sixth Amendment's Confrontation Clause");

---

[4] By contrast, use at trial of the fruits of the alleged police misconduct would not be a prerequisite to success in an action under Rev. Stat. § 1979, 42 U. S. C. § 1983, because such an action would indeed be challenging the conduct itself rather than the custody obtained by use at trial of the fruits of that conduct. Cf. *ante*, at 659 (citing *Jackson* v. *Suffolk County Homicide Bureau*, 135 F. 3d 254 (CA2 1998), where the Court of Appeals, in a § 1983 case, concluded that two different instances of postarrest police conduct were not part of a single transaction or occurrence). The Court's analysis thus lies in some tension with our understanding that the signal, defining feature setting habeas cases apart from other tort claims against the State is that they "necessarily demonstrat[e] the invalidity of the conviction," *Heck* v. *Humphrey*, 512 U. S. 477, 481–482 (1994); see generally *Wilkinson* v. *Dotson*, 544 U. S. 74, 78–82 (2005).

ante, at 649 ("He asserted that, in the course of pretrial interrogation, the police used coercive tactics to obtain damaging statements from him, and that admission of those statements at trial violated his Fifth Amendment right against self-incrimination").[5] Moreover, habeas review will of course look at more of the underlying trial record than just the ruling admitting the disputed evidence, for Felix's claims like a great many others will call for examining the trial record as a whole for signs of requisite prejudice or reversible error.[6] Here, for example, if a court were to conclude that introducing Felix's statements did violate the Fifth Amendment, relief would still turn on whether the

---

[5] There are other examples of the Court's describing Felix's claims with reference to the trial. See *ante*, at 650 ("Felix's Fifth Amendment claim rested on the prosecution's introduction of statements Felix made during pretrial police interrogation. . . . His Sixth Amendment claim related to the admission of the videotaped statements prosecution witness Kenneth Williams made at a jailhouse interview"); *ante*, at 651 ("On direct appeal, Felix urged . . . that the admission of Williams' videotaped statements violated Felix's constitutional right to confront the witnesses against him. He did not, however, argue that admission of his own pretrial statements violated his right to protection against self-incrimination").

[6] See *Neder* v. *United States*, 527 U. S. 1, 18 (1999) ("The erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination, and the erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment are both subject to harmless-error analysis under our cases" (citations omitted)); *Penry* v. *Johnson*, 532 U. S. 782, 795 (2001) (success on Fifth Amendment self-incrimination claim in habeas case requires showing that the error had "substantial and injurious effect or influence in determining the jury's verdict" (internal quotation marks omitted)); see also, *e. g.*, *Banks* v. *Dretke*, 540 U. S. 668, 691 (2004) (elements of prosecutorial misconduct claim under *Brady* v. *Maryland*, 373 U. S. 83 (1963), include showing of prejudice); *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974) (improper prosecutorial comment not reversible error unless remarks "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process"); *Strickland* v. *Washington*, 466 U. S. 668, 695 (1984) (to find prejudice for purposes of ineffective-assistance claim, court "must consider the totality of the evidence before the judge or jury").

error was harmless. This would call for a careful look at the other evidence admitted at trial, including the statements said to have come in contrary to the Confrontation Clause. In sum, Felix's claims are not outside the text of Rule 15(c)(2).

Then there are a number of indications that Congress would not want the rule read narrowly, the first centering on the word "transaction." That term not only goes to the breadth of relation back, but also to the scope of claim preclusion. *E. g.*, *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 482, n. 22 (1982) ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes . . . "); accord, 1 Restatement (Second) of Judgments § 24(1) (1980) ("[T]he claim extinguished includes all rights . . . with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose"). For purposes of claim preclusion in habeas cases, the scope of "transaction" is crucial in applying AEDPA's limitation on second or successive petitions: with very narrow exceptions, federal habeas limits a prisoner to only one petition challenging his conviction or sentence. See 28 U. S. C. § 2244(b)(1).[7] The provisions limiting second or successive habeas petitions regard the relevant "transaction" for purposes of habeas claim preclusion as the trial that yielded the conviction or sentence under attack; once a challenge to that conviction or sentence has been rejected, other challenges are barred even if they raise different claims. By contrast, under the Court's view of Rule 15(c) that the relevant "transaction" is the facts or conduct underlying each discrete claim, a prisoner should be allowed to file a second

---

[7] The Court asserts that my argument here "builds . . . on an apparent assumption that claim preclusion operates in habeas cases largely as it does in mine-run civil cases." *Ante*, at 661, n. 6. In actuality, the argument rests only on a fact we have previously recognized: that AEDPA's "restrictions on successive petitions constitute a modified res judicata rule . . . ." *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996).

habeas petition so long as it is based on different underlying facts or conduct (*i. e.*, on what the Court considers a separate "transaction"). The Court thus adopts, for purposes of relation back in habeas cases, a definition of "transaction" different from the one Congress apparently intended for purposes of claim preclusion in habeas cases. Judge Easterbrook explained this tension in *Ellzey* v. *United States*, 324 F. 3d 521 (CA7 2003), and the Court offers no evidence that Congress would have decreed any such apparent anomaly within the body of habeas standards.[8]

There is, rather, a fair indication that Congress would have intended otherwise, in the fact that it has already placed limits on the right of some habeas petitioners to amend their petitions. In Chapter 154 of Title 28, providing special procedures for habeas cases brought by petitioners subject to capital sentences in certain States, Congress specifically prohibited amendment of the original habeas petitions after the filing of the answer, except on the grounds specified for second or successive petitions under 28 U. S. C. § 2244(b). See § 2266(b)(3)(B). Congress's intent to limit capital petitioners' opportunity to amend (and thus to take advantage of relation back) makes sense owing to capital petitioners' incentive for delay, but the provision it enacted also helps us make sense of Rule 15(c) in the usual habeas case where a prisoner has no incentive to string the process out. For Congress has shown not only that it knows how to limit amendment in habeas cases, but also that it specifically considered the subject of limiting amendment in such cases and chose not to limit amendment in the ordinary ones.

---

[8]The Court is mistaken in stating that I "would read Rule 15(c)(2)'s words, 'conduct, transaction, or occurrence,' into . . . 28 U. S. C. §§ 2244(b) and 2255, ¶ 8 . . . ." *Ante*, at 662, n. 6. What I would do is adopt, for purposes of reconciling Rule 15(c)(2) with AEDPA's 1-year statute of limitations, a definition of "transaction" that is consistent with what other sections of AEDPA, those governing second or successive petitions, functionally regard as the relevant "transaction."

The final reason to view the trial as the relevant "transaction" in Rule 15(c)(2) lies in the real consequences of today's decision, which will fall most heavily on the shoulders of indigent habeas petitioners who can afford no counsel without the assistance of the court. In practical terms, the significance of the right to amend arises from the fact that in the overwhelming majority of cases, the original petition is the work of a *pro se* petitioner. See *Duncan* v. *Walker*, 533 U. S. 167, 191 (2001) (BREYER, J., dissenting) (93% of habeas petitioners in study were *pro se* (citing U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 14 (1995))); 1 Hertz & Liebman § 12.2, at 601 ("[N]early all" federal habeas petitioners commence proceedings either without legal assistance or with only the aid of a fellow inmate or a volunteer attorney). Unless required by statute, appointment of counsel is most often a matter of discretion on the part of the court. The district judge may well choose not to exercise that discretion unless and until a habeas proceeding advances to the stage of discovery or evidentiary hearing. See Habeas Corpus Rule 6(a) (requiring appointment of counsel for indigent petitioner "[i]f necessary for effective discovery"); Rule 8(c) (requiring appointment of counsel "[i]f an evidentiary hearing is warranted"). And the judge almost certainly will not appoint counsel until after the preliminary review of the petition to see whether it plainly warrants dismissal. See Rule 4. Where a petition (even in its *pro se* form) has survived this review by showing enough merit to justify appointing counsel, it makes no sense to say that counsel (appointed because of that apparent merit) should be precluded from exercising professional judgment when that judgment calls for adding a new ground for relief that would relate back to the filing of the original petition. For by hobbling counsel this way, the Court limits the capacity of appointed counsel to provide the professional service that a paid lawyer, hired at the outset,

can give a client. The lawyer hired at the start of the proceeding will be able to draft an original petition containing all the claims revealed to his trained eye; if the same lawyer is appointed by the court only after the petitioner has demonstrated some merit in an original *pro se* filing, he and his prisoner client will have no right to state all claims by adding to the original petition, unless the lawyer happens to be appointed and able to get up to speed before the statute of limitations runs out. The rule the Court adopts today may not make much difference to prisoners with enough money to hire their own counsel; but it will matter a great deal to poor prisoners who need appointed counsel to see and plead facts showing a colorable basis for relief.[9]

The Court of Appeals got it right, and I respectfully dissent.

---

[9] It is not that I see the Court's rule as constitutionally troubling. But this case requires us to apply text that is ambiguous, and the Court's resolution of that ambiguity is based on the assumption that when Congress authorized the appointment of counsel in habeas cases, it would have intended the appointed lawyer to have one hand tied behind his back, as compared with an attorney hired by a prisoner with money. That is not in my view a sound assumption. (The Court also observes that in this case counsel had plenty of time to file an amended petition, but that fact cannot drive this decision, for the rule the Court adopts today will of course apply in cases other than this one.)

Syllabus

VAN ORDEN *v.* PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03–1500. Argued March 2, 2005—Decided June 27, 2005

Among the 21 historical markers and 17 monuments surrounding the Texas State Capitol is a 6-foot-high monolith inscribed with the Ten Commandments. The legislative record illustrates that, after accepting the monument from the Fraternal Order of Eagles—a national social, civic, and patriotic organization—the State selected a site for it based on the recommendation of the state organization that maintains the capitol grounds. Petitioner, an Austin resident who encounters the monument during his frequent visits to those grounds, brought this 42 U. S. C. § 1983 suit seeking a declaration that the monument's placement violates the First Amendment's Establishment Clause and an injunction requiring its removal. Holding that the monument did not contravene the Clause, the District Court found that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency, and that a reasonable observer, mindful of history, purpose, and context, would not conclude that this passive monument conveyed the message that the State endorsed religion. The Fifth Circuit affirmed.

Held: The judgment is affirmed.

351 F. 3d 173, affirmed.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS, concluded that the Establishment Clause allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. Reconciling the strong role played by religion and religious traditions throughout our Nation's history, see *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 212–213, with the principle that governmental intervention in religious matters can itself endanger religious freedom requires that the Court neither abdicate its responsibility to maintain a division between church and state nor evince a hostility to religion, *e. g.*, *Zorach* v. *Clauson*, 343 U. S. 306, 313–314. While the Court has sometimes pointed to *Lemon* v. *Kurtzman*, 403 U. S. 602, for the governing test, *Lemon* is not useful in dealing with the sort of passive monument that Texas has erected on

its capitol grounds. Instead, the analysis should be driven by both the monument's nature and the Nation's history. From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. *Lynch* v. *Donnelly*, 465 U. S. 668, 674. Texas' display of the Commandments on government property is typical of such acknowledgments. Representations of the Commandments appear throughout this Court and its grounds, as well as the Nation's Capital. Moreover, the Court's opinions, like its building, have recognized the role the Decalogue plays in America's heritage. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 442, 462. While the Commandments are religious, they have an undeniable historical meaning. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. See, *e. g.*, *Lynch* v. *Donnelly*, *supra*, at 680, 687. There are, of course, limits to the government's display of religious messages or symbols. For example, this Court held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone* v. *Graham*, 449 U. S. 39, 41–42. However, neither *Stone* itself nor subsequent opinions have indicated that *Stone*'s holding would extend beyond the context of public schools to a legislative chamber, see *Marsh* v. *Chambers*, 463 U. S. 783, or to capitol grounds. Texas' placement of the Commandments monument on its capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, petitioner here apparently walked by the monument for years before bringing this suit. *Schempp*, *supra*, and *Lee* v. *Weisman*, 505 U. S. 577, distinguished. Texas has treated its capitol grounds monuments as representing several strands in the State's political and legal history. The inclusion of the Commandments monument in this group has a dual significance, partaking of both religion and government, that cannot be said to violate the Establishment Clause. Pp. 683–692.

JUSTICE BREYER concluded that this is a difficult borderline case where none of the Court's various tests for evaluating Establishment Clause questions can substitute for the exercise of legal judgment. See, *e. g.*, *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 305 (Goldberg, J., concurring). That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the First Amendment's Religion Clauses—to assure the fullest possible scope of religious liberty and tolerance for all, to avoid the religious divisiveness that promotes social conflict, and to maintain the separation of church and state. No exact formula can dictate a resolution to fact-intensive cases such as this.

Syllabus

Despite the Commandments' religious message, an inquiry into the context in which the text of the Commandments is used demonstrates that the Commandments also convey a secular moral message about proper standards of social conduct and a message about the historic relation between those standards and the law. The circumstances surrounding the monument's placement on the capitol grounds and its physical setting provide a strong, but not conclusive, indication that the Commandments' text as used on this monument conveys a predominantly secular message. The determinative factor here, however, is that 40 years passed in which the monument's presence, legally speaking, went unchallenged (until the single legal objection raised by petitioner). Those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their belief systems, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to establish religion. See *ibid.* The public visiting the capitol grounds is more likely to have considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage. For these reasons, the Texas display falls on the permissible side of the constitutional line. Pp. 698–705.

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., *post*, p. 692, and THOMAS, J., *post*, p. 692, filed concurring opinions. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 698. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 707. O'CONNOR, J., filed a dissenting opinion, *post*, p. 737. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 737.

Erwin Chemerinsky argued the cause for petitioner. With him on the briefs were *Mark Rosenbaum* and *Paul Hoffman*.

Greg Abbott, Attorney General of Texas, argued the cause for respondents. With him on the brief were *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach* and *Don R. Willett*, Deputy Attorneys General, *R. Ted Cruz*, Solicitor General, *Joel L. Thollander* and *Amy Warr*, Assistant Solicitors General, and *Paul Michael Winget-Hernandez*, Assistant Attorney General.

Counsel

Acting Solicitor General Clement argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Assistant Attorney General Keisler, Deputy Assistant Attorney General Katsas, Patricia A. Millett, Robert M. Loeb,* and *Lowell V. Sturgill, Jr.**

---

*Briefs of *amici curiae* urging reversal were filed for American Atheists by *Robert J. Bruno;* for the American Humanist Association et al. by *Elizabeth L. Hileman;* for the American Jewish Congress et al. by *Marc D. Stern* and *Jeffrey Sinensky;* for Americans United for Separation of Church and State et al. by *Ian Heath Gershengorn, William M. Hohengarten, Ayesha Khan, Richard B. Katskee, Elliot M. Mincberg,* and *Judith E. Schaeffer;* for the Anti-Defamation League et al. by *Jeffrey R. Babbin, Aaron S. Bayer, Kenneth D. Heath, Frederick M. Lawrence, Daniel S. Alter,* and *Steven M. Freeman;* for the Baptist Joint Committee et al. by *Douglas Laycock* and *K. Hollyn Hollman;* for the Council for Secular Humanism by *Edward Tabash;* for the Freedom from Religion Foundation by *James A. Friedman* and *James D. Peterson;* and for the Hindu American Foundation et al. by *Henry C. Dinger, Jeffrey A. Simes, Keith A. Zullow, Aseem V. Mehta,* and *Jessica Jamieson.*

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Steve Carter,* Attorney General of Indiana, *Thomas M. Fisher,* and *Rebecca Walker,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Charles J. Crist, Jr.,* of Florida, *Lawrence G. Wasden* of Idaho, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.,* of Louisiana, *Jim Hood* of Mississippi, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Gerald J. Pappert* of Pennsylvania, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, and *Patrick J. Crank* of Wyoming; for the American Center for Law and Justice by *Jay Alan Sekulow, Stuart J. Roth, Francis J. Manion,* and *Walter M. Weber;* for the American Family Association Center for Law & Policy by *Stephen M. Crampton, Brian Fahling,* and *Michael J. DePrimo;* for the Becket Fund for Religious Liberty by *Anthony R. Picarello, Jr.;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III;* for the Eagle Forum Education & Legal Defense Fund by *Douglas G. Smith* and *Phyllis Schlafly;* for the Ethics and Public Policy Center by *Mark A. Perry;* for the Foundation for Moral Law, Inc., by *Benjamin D. DuPré* and *Gregory M. Jones;* for the Fraternal Order of Eagles by *Kelly Shackelford* and

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join.

The question here is whether the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. We hold that it does.

The 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the "people, ideals, and events that compose Texan identity." Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001).[1] The monolith challenged here stands 6-feet high and 3-feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments. Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription "PRE-

George A. Miller; for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin, Alyza D. Lewin, Dennis Rapps, David Zwiebel,* and *Nathan J. Diament;* for the Pacific Justice Institute by *Peter D. Lepiscopo;* for the Rutherford Institute by *John W. Whitehead;* and for Janet Napolitano et al. by *Len L. Munsil.*

Briefs of *amici curiae* were filed for the Atheist Law Center et al. by *Pamela L. Sumners* and *Larry Darby;* for the Chester County Historic Preservation Network by *Alfred W. Putnam, Jr.;* for Faith and Action et al. by *Bernard P. Reese, Jr.;* for Focus on the Family et al. by *Benjamin W. Bull* and *Jordan W. Lorence;* for the Thomas More Law Center by *Edward L. White III;* and for Wallbuilders, Inc., by *Barry C. Hodge.*

[1] The monuments are: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.

SENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961." App. to Pet. for Cert. 21.

The legislative record surrounding the State's acceptance of the monument from the Eagles—a national social, civic, and patriotic organization—is limited to legislative journal entries. After the monument was accepted, the State selected a site for the monument based on the recommendation of the state organization responsible for maintaining the Capitol grounds. The Eagles paid the cost of erecting the monument, the dedication of which was presided over by two state legislators.

Petitioner Thomas Van Orden is a native Texan and a resident of Austin. At one time he was a licensed lawyer, having graduated from Southern Methodist Law School. Van Orden testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.

Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued numerous state officials in their official capacities under Rev. Stat. § 1979, 42 U. S. C. § 1983, seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal. After a bench trial, the District Court held that the monument did not contravene the Establishment Clause. It found that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency. The District Court also determined that a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion. The Court of Appeals affirmed the District

Court's holdings with respect to the monument's purpose and effect. 351 F. 3d 173 (CA5 2003). We granted certiorari, 543 U. S. 923 (2004), and now affirm.

Our cases, Janus*like*, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. As we observed in *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963):

> "It is true that religion has been closely identified with our history and government. . . . The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. . . . It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . . .]'" *Id.*, at 212–213.[2]

The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.

This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our

---

[2] See also *Engel* v. *Vitale*, 370 U. S. 421, 434 (1962) ("The history of man is inseparable from the history of religion"); *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being").

responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage:

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952).

See also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 845–846 (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").[3]

---

[3] Despite JUSTICE STEVENS' recitation of occasional language to the contrary, *post*, at 710–711, and n. 7 (dissenting opinion), we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion. See, *e. g.*, *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987); *Lynch* v. *Donnelly*, 465 U. S. 668 (1984); *Marsh* v. *Chambers*, 463 U. S. 783 (1983); *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970). Even the dissenters do not claim that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion. See *post*, at 711 (opinion of STEVENS, J.) (recognizing that the Establishment Clause permits some "recognition" or "acknowledgment" of religion); *post*, at 740–741, and n. 4 (opinion of SOUTER, J.) (discussing a number of permissible displays with religious content).

These two faces are evident in representative cases both upholding[4] and invalidating[5] laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed

---

[4] *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002) (upholding school voucher program); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001) (holding that allowing religious school groups to use school facilities does not violate the Establishment Clause); *Agostini* v. *Felton*, 521 U. S. 203 (1997) (approving a program that provided public employees to teach remedial classes at religious and other private schools), overruling *Aguilar* v. *Felton*, 473 U. S. 402 (1985) (barring public school teachers from going to parochial schools to provide remedial education to disadvantaged children), and *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985) (striking down a program that provided classes to religious school students at public expense in classrooms leased from religious schools); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995) (holding that the Establishment Clause does not bar disbursement of funds from student activity fees to religious organizations); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993) (allowing a public school district to provide a sign-language interpreter to a deaf student at a Catholic high school as part of a federal program for the disabled); *Lynch* v. *Donnelly*, *supra* (upholding a Christmas display including a crèche); *Marsh* v. *Chambers*, *supra* (upholding legislative prayer); *Mueller* v. *Allen*, 463 U. S. 388 (1983) (upholding tax deduction for certain expenses incurred in sending one's child to a religious school).

[5] *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290 (2000) (holding unconstitutional student-initiated and student-led prayer at school football games); *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687 (1994) (invalidating a state law that created a new school district for a single religious community); *Lee* v. *Weisman*, 505 U. S. 577 (1992) (prohibiting officially sponsored graduation prayers); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989) (holding the display of a crèche in a courthouse unconstitutional but allowing the display of a menorah outside a county building); *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989) (plurality opinion) (invalidating a sales tax exemption for all religious periodicals); *Edwards* v. *Aguillard*, 482 U. S. 578 (1987) (invalidating a law mandating the teaching of creationism if evolution was taught); *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985) (invalidating state law that gave employees an absolute right not to work on their Sabbath); *Wallace* v. *Jaffree*, 472 U. S. 38 (1985) (invalidating law mandating a daily minute of silence for meditation or voluntary prayer).

to *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), as providing the governing test in Establishment Clause challenges.[6] Compare *Wallace* v. *Jaffree*, 472 U. S. 38 (1985) (applying *Lemon*), with *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (not applying *Lemon*). Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as "no more than helpful signposts." *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973). Many of our recent cases simply have not applied the *Lemon* test. See, *e. g.*, *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.

Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

As we explained in *Lynch* v. *Donnelly*, 465 U. S. 668 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.*, at 674. For example, both Houses passed resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favors of Almighty God." 1 Annals of Cong. 90, 914 (internal quotation marks omitted). President Washington's procla-

---

[6] *Lemon* sets out a three-prong test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U. S., at 612–613 (citation omitted).

mation directly attributed to the Supreme Being the foundations and successes of our young Nation:

> "Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us." 1 J. Richardson, Messages and Papers of the Presidents, 1789–1897, p. 64 (1899).

Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," *School Dist. of Abington Township* v. *Schempp*, 374 U. S., at 212, and that "[t]he history of man is inseparable from the history of religion," *Engel* v. *Vitale*, 370 U. S. 421, 434 (1962).[7] This recognition

[7] See also *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 26 (2004) (REHNQUIST, C. J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound"); *id.*, at 35–36 (O'CONNOR, J., concurring in judg-

has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. *Marsh* v. *Chambers*, 463 U. S., at 792.[8] Such a practice, we thought, was "deeply embedded in the history and tradition of this country." *Id.*, at 786. As we observed there, "it would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Id.*, at 790–791. With similar reasoning, we have upheld laws, which originated from one of the Ten Commandments, that prohibited the sale of merchandise on Sunday. *McGowan* v. *Maryland*, 366 U. S. 420, 431–440 (1961); see *id.*, at 470–488 (separate opinion of Frankfurter, J.).

In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

---

ment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths"); *Lynch* v. *Donnelly*, 465 U. S., at 675 ("Our history is replete with official references to the value and invocation of Divine guidance").

[8] Indeed, we rejected the claim that an Establishment Clause violation was presented because the prayers had once been offered in the Judeo-Christian tradition: In *Marsh*, the prayers were often explicitly Christian, but the chaplain removed all references to Christ the year after the suit was filed. 463 U. S., at 793–794, and n. 14.

Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.[9]

Our opinions, like our building, have recognized the role the Decalogue plays in America's heritage. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S., at 442; *id.*, at 462 (separate opin-

---

[9] Other examples of monuments and buildings reflecting the prominent role of religion abound. For example, the Washington, Jefferson, and Lincoln Memorials all contain explicit invocations of God's importance. The apex of the Washington Monument is inscribed "Laus Deo," which is translated to mean "Praise be to God," and multiple memorial stones in the monument contain Biblical citations. The Jefferson Memorial is engraved with three quotes from Jefferson that make God a central theme. Inscribed on the wall of the Lincoln Memorial are two of Lincoln's most famous speeches, the Gettysburg Address and his Second Inaugural Address. Both inscriptions include those speeches' extensive acknowledgments of God. The first federal monument, which was accepted by the United States in honor of sailors who died in Tripoli, noted the dates of the fallen sailors as "the year of our Lord, 1804, and in the 28 year of the independence of the United States."

ion of Frankfurter, J.).[10] The Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandments. See, *e. g.*, Public Papers of the Presidents, Harry S. Truman, 1950, p. 157 (1965); S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H. Con. Res. 31, 105th Cong., 1st Sess. (1997). These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.

Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. See *Lynch* v. *Donnelly*, 465 U. S., at 680, 687; *Marsh* v. *Chambers*, 463 U. S., at 792; *McGowan* v. *Maryland*, *supra*, at 437–440; *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 676–678 (1970).

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*. In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose. *Id.*, at 41. As evidenced by *Stone*'s almost exclusive reliance upon two of our school

---

[10] See also *Edwards* v. *Aguillard*, 482 U. S., at 593–594; *Lynch* v. *Donnelly*, 465 U. S., at 677–678; *id.*, at 691 (O'CONNOR, J., concurring); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S., at 652–653 (STEVENS, J., concurring in part and dissenting in part); *Stone* v. *Graham*, 449 U. S. 39, 45 (1980) (REHNQUIST, J., dissenting).

prayer cases, *id.*, at 41–42 (citing *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), and *Engel* v. *Vitale*, 370 U. S. 421 (1962)), it stands as an example of the fact that we have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards* v. *Aguillard*, 482 U. S. 578, 583–584 (1987). Compare *Lee* v. *Weisman*, 505 U. S. 577, 596–597 (1992) (holding unconstitutional a prayer at a secondary school graduation), with *Marsh* v. *Chambers*, *supra* (upholding a prayer in the state legislature). Indeed, *Edwards* v. *Aguillard* recognized that *Stone*—along with *Schempp* and *Engel*—was a consequence of the "particular concerns that arise in the context of public elementary and secondary schools." 482 U. S., at 584–585. Neither *Stone* itself nor subsequent opinions have indicated that *Stone*'s holding would extend to a legislative chamber, see *Marsh* v. *Chambers*, *supra*, or to capitol grounds.[11]

The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit. The monument is therefore also quite different from the prayers involved in *Schempp* and *Lee* v. *Weisman*. Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this

[11] Nor does anything suggest that *Stone* would extend to displays of the Ten Commandments that lack a "plainly religious," "pre-eminent purpose," *id.*, at 41. See *Edwards* v. *Aguillard*, *supra*, at 593–594 ("*[Stone]* did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization"). Indeed, we need not decide in this case the extent to which a primarily religious purpose would affect our analysis because it is clear from the record that there is no evidence of such a purpose in this case.

group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the opinion of THE CHIEF JUSTICE because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time. I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments. See *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, at 885–894 (SCALIA, J., dissenting).

JUSTICE THOMAS, concurring.

The Court holds that the Ten Commandments monument found on the Texas State Capitol grounds does not violate the Establishment Clause. Rather than trying to suggest meaninglessness where there is meaning, THE CHIEF JUSTICE rightly recognizes that the monument has "religious significance." *Ante*, at 690. He properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history. *Ante*, at 686–688. For those reasons, I join THE CHIEF JUSTICE's opinion in full.

This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing

Establishment Clause challenges,* and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history "resis[t] incorporation" against the States. See *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 45–46 (2004) (opinion concurring in judgment); see also *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 677–680, and n. 3 (2002) (concurring opinion). If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.

Even if the Clause is incorporated, or if the Free Exercise Clause limits the power of States to establish religions, see *Cutter* v. *Wilkinson*, 544 U. S. 709, 728, n. 3 (2005) (THOMAS, J., concurring), our task would be far simpler if we returned to the original meaning of the word "establishment" than it is under the various approaches this Court now uses. The Framers understood an establishment "necessarily [to] involve actual legal coercion." *Newdow*, *supra*, at 52 (THOMAS, J., concurring in judgment); *Lee* v. *Weisman*, 505 U. S. 577, 640 (1992) (SCALIA, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*"). "In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." *Cutter*, *supra*, at 729 (THOMAS, J., concurring). And "government practices that have nothing to do with creating or maintaining . . . coercive state establishments" simply do not "implicate the possible liberty interest of being

*See, *e. g.*, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989) (employing endorsement test); *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971) (setting forth three-pronged test); *Marsh* v. *Chambers*, 463 U. S. 783, 790–792 (1983) (upholding legislative prayer due to its "unique history"); see also *Lynch* v. *Donnelly*, 465 U. S. 668, 679–681 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area").

free from coercive state establishments." *Newdow, supra,* at 53 (THOMAS, J., concurring in judgment).

There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.

Returning to the original meaning would do more than simplify our task. It also would avoid the pitfalls present in the Court's current approach to such challenges. This Court's precedent elevates the trivial to the proverbial "federal case," by making benign signs and postings subject to challenge. Yet even as it does so, the Court's precedent attempts to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by counterfactually declaring them of little religious significance. Even when the Court's cases recognize that such symbols have religious meaning, they adopt an unhappy compromise that fails fully to account for either the adherent's or the nonadherent's beliefs, and provides no principled way to choose between them. Even worse, the incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts, governments, and believers and nonbelievers alike confused—an observation that is hardly new. See *Newdow, supra,* at 45, n. 1 (THOMAS, J., concurring in judgment) (collecting cases).

First, this Court's precedent permits even the slightest public recognition of religion to constitute an establishment of religion. For example, individuals frequenting a county

courthouse have successfully challenged as an Establishment Clause violation a sign at the courthouse alerting the public that the building was closed for Good Friday and containing a 4-inch-high crucifix. *Granzeier* v. *Middleton*, 955 F. Supp. 741, 743, and n. 2, 746–747 (ED Ky. 1997), aff'd on other grounds, 173 F. 3d 568, 576 (CA6 1999). Similarly, a park ranger has claimed that a cross erected to honor World War I veterans on a rock in the Mojave Desert Preserve violated the Establishment Clause, and won. See *Buono* v. *Norton*, 212 F. Supp. 2d 1202, 1204–1205, 1215–1217 (CD Cal. 2002). If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge. Still other suits have charged that city seals containing religious symbols violate the Establishment Clause. See, *e. g.*, *Robinson* v. *Edmond*, 68 F. 3d 1226 (CA10 1995); *Murray* v. *Austin*, 947 F. 2d 147 (CA5 1991); *Friedman* v. *Board of Cty. Comm'rs of Bernalillo Cty.*, 781 F. 2d 777 (CA10 1985) (en banc). In every instance, the litigants are mere "[p]assersby . . . free to ignore [such symbols or signs], or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 664 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part).

Second, in a seeming attempt to balance out its willingness to consider almost any acknowledgment of religion an establishment, in other cases Members of this Court have concluded that the term or symbol at issue has no religious meaning by virtue of its ubiquity or rote ceremonial invocation. See, *e. g.*, *id.*, at 630–631 (O'CONNOR, J., concurring in part and concurring in judgment); *Lynch* v. *Donnelly*, 465 U. S. 668, 716–717 (1984) (Brennan, J., dissenting). But words such as "God" have religious significance. For example, just last Term this Court had before it a challenge to the recitation of the Pledge of Allegiance, which includes the

phrase "one Nation under God." The declaration that our country is "'one Nation under God'" necessarily "entail[s] an affirmation that God exists." *Newdow*, 542 U. S., at 48 (THOMAS, J., concurring in judgment). This phrase is thus anathema to those who reject God's existence and a validation of His existence to those who accept it. Telling either nonbelievers or believers that the words "under God" have no meaning contradicts what they know to be true. Moreover, repetition does not deprive religious words or symbols of their traditional meaning. Words like "God" are not vulgarities for which the shock value diminishes with each successive utterance.

Even when this Court's precedents recognize the religious meaning of symbols or words, that recognition fails to respect fully religious belief or disbelief. This Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display. See, *e. g.*, *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 780 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) (presuming that a reasonable observer is "aware of the history and context of the community and forum in which the religious display appears"). In looking to the view of this unusually informed observer, this Court inquires whether the sign or display "sends the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 309–310 (2000) (quoting *Lynch*, *supra*, at 688 (O'CONNOR, J., concurring)).

This analysis is not fully satisfying to either nonadherents or adherents. For the nonadherent, who may well be more sensitive than the hypothetical "reasonable observer," or who may not know all the facts, this test fails to capture completely the honest and deeply felt offense he takes from

the government conduct. For the adherent, this analysis takes no account of the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith. The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views. In sum, this Court's effort to assess religious meaning is fraught with futility.

Finally, the very "flexibility" of this Court's Establishment Clause precedent leaves it incapable of consistent application. See *Edwards* v. *Aguillard*, 482 U. S. 578, 640 (1987) (SCALIA, J., dissenting) (criticizing the *Lemon* test's "flexibility" as "the absence of any principled rationale" (internal quotation marks omitted)). The inconsistency between the decisions the Court reaches today in this case and in *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, p. 844, only compounds the confusion.

The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. See, *e. g.*, *Harris* v. *Zion*, 927 F. 2d 1401, 1425 (CA7 1991) (Easterbrook, J., dissenting) ("Line drawing in this area will be erratic and heavily influenced by the personal views of the judges"); *post*, at 700 (BREYER, J., concurring in judgment) ("I see no test-related substitute for the exercise of legal judgment"). The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.

Much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application. While the Court cor-

rectly rejects the challenge to the Ten Commandments monument on the Texas Capitol grounds, a more fundamental rethinking of our Establishment Clause jurisprudence remains in order.

JUSTICE BREYER, concurring in the judgment.

In *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), Justice Goldberg, joined by Justice Harlan, wrote, in respect to the First Amendment's Religion Clauses, that there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible." *Id.*, at 306 (concurring opinion). One must refer instead to the basic purposes of those Clauses. They seek to "assure the fullest possible scope of religious liberty and tolerance for all." *Id.*, at 305. They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike. *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 717–729 (2002) (BREYER, J., dissenting). They seek to maintain that "separation of church and state" that has long been critical to the "peaceful dominion that religion exercises in [this] country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reign[ing] together" but in separate spheres "on the same soil." A. de Tocqueville, Democracy in America 282–283 (1835) (H. Mansfield & D. Winthrop transls. and eds. 2000). They seek to further the basic principles set forth today by JUSTICE O'CONNOR in her concurring opinion in *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, at 881.

The Court has made clear, as Justices Goldberg and Harlan noted, that the realization of these goals means that government must "neither engage in nor compel religious practices," that it must "effect no favoritism among sects or between religion and nonreligion," and that it must "work deterrence of no religious belief." *Schempp*, *supra*, at 305 (concurring opinion); see also *Lee* v. *Weisman*, 505 U. S. 577,

587 (1992); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15–16 (1947). The government must avoid excessive interference with, or promotion of, religion. See generally *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 593–594 (1989); *Zelman*, *supra*, at 723–725 (BREYER, J., dissenting). But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. See, *e. g.*, *Marsh* v. *Chambers*, 463 U. S. 783 (1983). Such absolutism is not only inconsistent with our national traditions, see, *e. g.*, *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971); *Lynch* v. *Donnelly*, 465 U. S. 668, 672–678 (1984), but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Thus, as Justices Goldberg and Harlan pointed out, the Court has found no single mechanical formula that can accurately draw the constitutional line in every case. See *Schempp*, 374 U. S., at 306 (concurring opinion). Where the Establishment Clause is at issue, tests designed to measure "neutrality" alone are insufficient, both because it is sometimes difficult to determine when a legal rule is "neutral," and because

> "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Ibid.*

Neither can this Court's other tests readily explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, see *Marsh*, *supra;* certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving. See,

e. g., *Lemon*, *supra*, at 612–613 (setting forth what has come to be known as the "*Lemon* test"); *Lynch*, *supra*, at 687 (O'CONNOR, J., concurring) (setting forth the "endorsement test"); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 800, n. 5 (1995) (STEVENS, J., dissenting) (agreeing that an "endorsement test" should apply but criticizing its "reasonable observer" standard); *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 319 (2000) (REHNQUIST, C. J., dissenting) (noting *Lemon*'s "checkered career in the decisional law of this Court"); *County of Allegheny*, *supra*, at 655–656 (KENNEDY, J., joined by REHNQUIST, C. J., and White and SCALIA, JJ., concurring in judgment in part and dissenting in part) (criticizing the *Lemon* test).

If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment. See *Schempp*, *supra*, at 305 (Goldberg, J., concurring); cf. *Zelman*, *supra*, at 726–728 (BREYER, J., dissenting) (need for similar exercise of judgment where quantitative considerations matter). That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts—and might well lead to the same result the Court reaches today, see, *e. g.*, *Lemon*, *supra*, at 612–613; *Capitol Square*, *supra*, at 773–783 (O'CONNOR, J., concurring in part and concurring in judgment)—no exact formula can dictate a resolution to such fact-intensive cases.

The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. On the one hand, the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the

Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display.

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States. See generally App. to Brief for United States as *Amicus Curiae* 1a–7a.

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate. And the monument's 40-year history on the Texas state grounds indicates that that has been its effect.

The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency. See Tex. S. Con. Res. 16, 57th Leg., Reg. Sess. (1961). The Eagles' consultation with a committee composed of members of several faiths in order to find a nonsectarian text underscores the group's ethics-based motives. See Brief for Respondents 5–6, and n. 9. The tablets, as displayed on the monument, prominently acknowledge that the Eagles donated the display, a factor which, though not sufficient, thereby further distances

the State itself from the religious aspect of the Commandments' message.

The physical setting of the monument, moreover, suggests little or nothing of the sacred. See Appendix A, *infra*. The monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the "ideals" of those who settled in Texas and of those who have lived there since that time. Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001); see Appendix B, *infra*. The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed. That is to say, the context suggests that the State intended the display's moral message—an illustrative message reflecting the historical "ideals" of Texans—to predominate.

If these factors provide a strong, but not conclusive, indication that the Commandments' text on this monument conveys a predominantly secular message, a further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." *Schempp*, 374 U. S., at 305 (Goldberg, J., concurring). Those 40 years suggest that

the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state. See, *e. g.*, *Weisman*, 505 U. S., at 592; *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*. This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. See *post*, at 869–873 (opinion of the Court). That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, preexisting monument has not.

For these reasons, I believe that the Texas display—serving a mixed but primarily nonreligious purpose, not primarily "advanc[ing]" or "inhibit[ing] religion," and not creating an "excessive government entanglement with religion"—might satisfy this Court's more formal Establishment Clause tests. *Lemon*, 403 U. S., at 612–613 (internal quotation marks omitted); see also *Capitol Square*, 515 U. S., at 773–783 (O'CONNOR, J., concurring in part and concurring in judgment). But, as I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any partic-

ular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.

At the same time, to reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid. *Zelman*, 536 U. S., at 717–729 (BREYER, J., dissenting).

Justices Goldberg and Harlan concluded in *Schempp* that

> "[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact." 374 U. S., at 308 (concurring opinion).

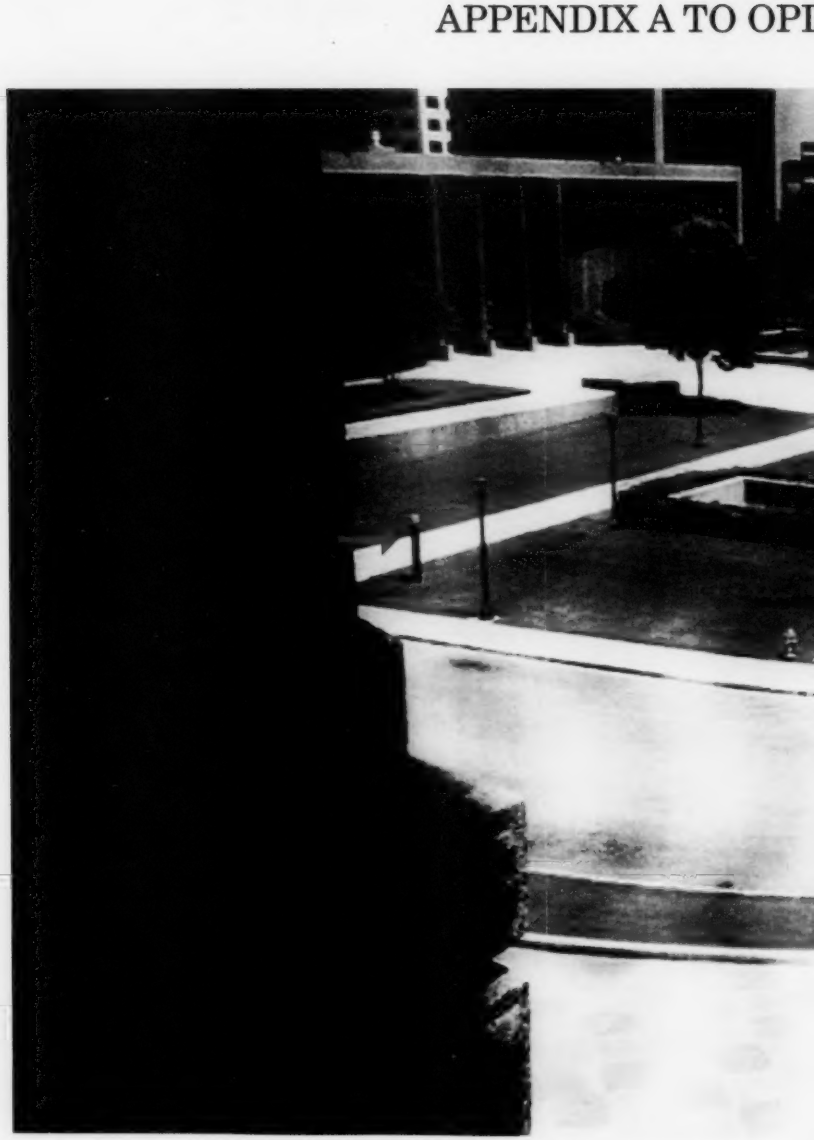
That kind of practice is what we have here. I recognize the danger of the slippery slope. Still, where the Establishment Clause is at issue, we must "distinguish between real threat and mere shadow." *Ibid.* Here, we have only the shadow.

In light of these considerations, I cannot agree with today's plurality's analysis. Nor can I agree with JUSTICE SCALIA's dissent in *McCreary County*, *post*, at 885. I do agree with JUSTICE O'CONNOR's statement of principles in *McCreary County*, *post*, at 881–883, though I disagree with

her evaluation of the evidence as it bears on the application of those principles to this case.

I concur in the judgment of the Court.

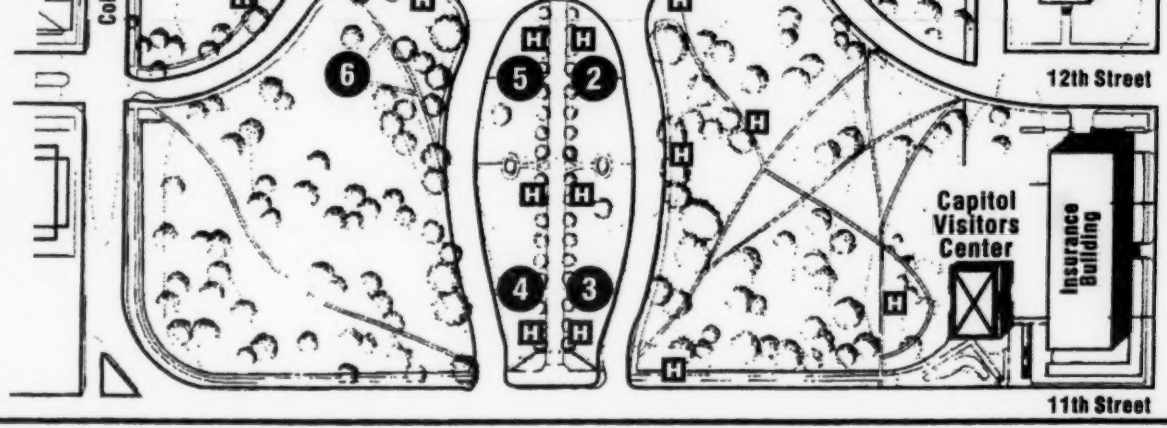
[Appendixes A and B to opinion of BREYER, J., follow this page.]



Red arrow points to Ten C

en Commandments Monument.

APPENDIX B TO OPI



1. Hood's Brigade
2. Heroes of the Alamo
3. Confederate Soldiers
4. Volunteer Firemen
5. Terry's Texas Rangers
6. Texas Cowboy
7. "The Hiker"
8. 36th Infantry
9. Ten Commandments
10. Tribute to Texas Children
11. Texas Pioneer Woman
12. Statue of Liberty Replica
13. Pearl Harbor Veterans
14. Korean War Veterans
15. Soldiers of World War I
16. Disabled Veterans
17. Texas Peace Officers

H = Historical Marker

CAPITOL MONUMENT GUIDE

NORTH

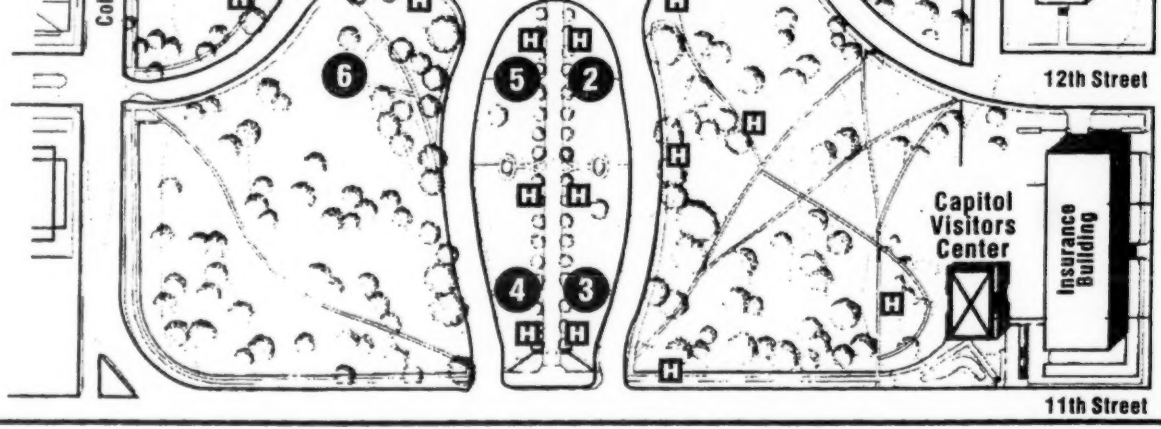
NOTE: The diagram above has been simplified for clarity and does not accurately reflect all details of the actual grounds.

SPB:dry:GuideMonuments.ccb:10-01-00

EXHIBIT
47
A-01-CA-833-H

Colorado Street
Tom Clark Building
14th Street
Colorado Street
Supreme Court Bldg.
John Reagan Building
CAPITOL
T.W.C. Building
Brazos Street
Sam Houston Building
T.W.C. Annex
15th Street
Brazos Street
State Library & Archives
13th Street
14th Street

APPENDIX B TO OPI



1. Hood's Brigade
2. Heroes of the Alamo
3. Confederate Soldiers
4. Volunteer Firemen
5. Terry's Texas Rangers
6. Texas Cowboy
7. "The Hiker"
8. 36th Infantry
9. Ten Commandments
10. Tribute to Texas Children
11. Texas Pioneer Woman
12. Statue of Liberty Replica
13. Pearl Harbor Veterans
14. Korean War Veterans
15. Soldiers of World War I
16. Disabled Veterans
17. Texas Peace Officers

H = Historical Marker

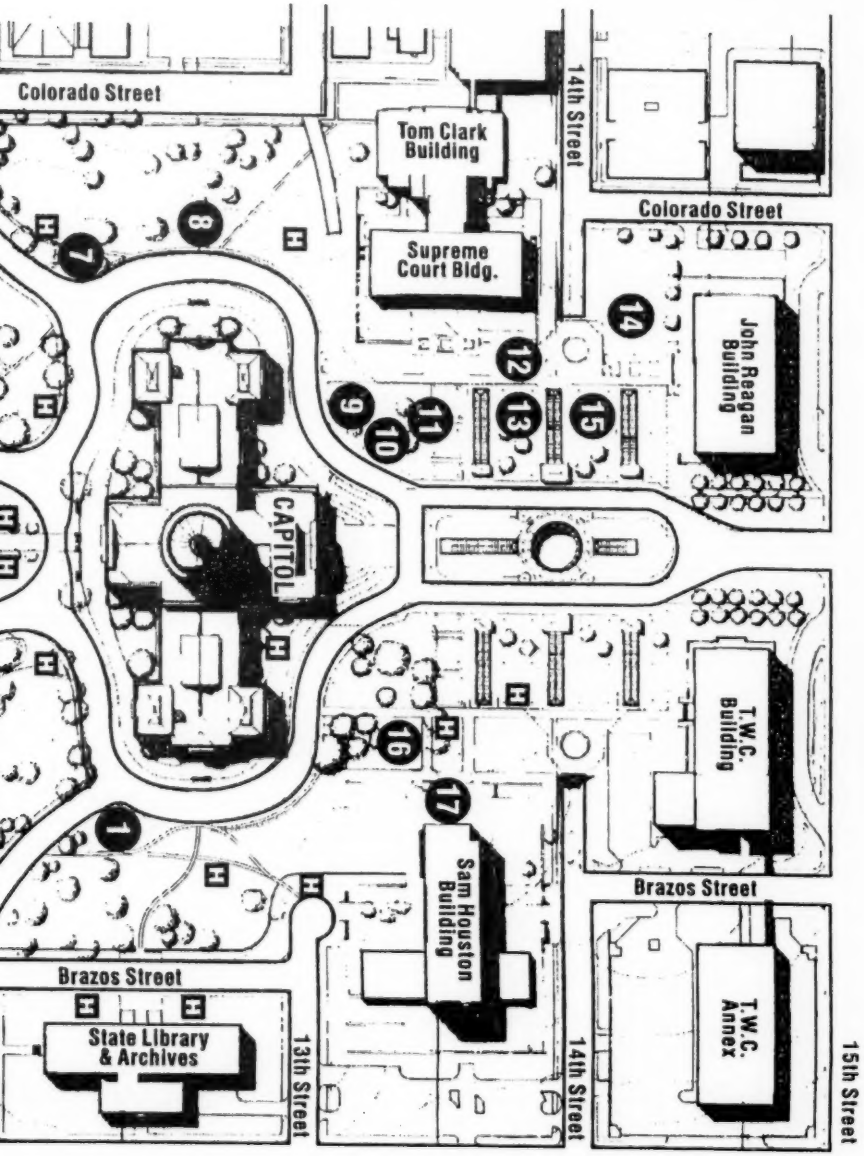
CAPITOL MONUMENT GUIDE

NORTH

NOTE: The diagram above has been simplified for clarity and does not accurately reflect all details of the actual grounds.

SPB:dry:GuideMonuments.cdr:10-01-00

EXHIBIT
47
A-01-CA-833-H


Colorado Street
Tom Clark Building
14th Street
Colorado Street
Supreme Court Bldg.
John Reagan Building
CAPITOL
T.W.C. Building
Brazos Street
Sam Houston Building
T.W.C. Annex
15th Street
Brazos Street
State Library & Archives
13th Street
14th Street

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. It is significant because, and only because, it communicates the following message:

"I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor's house.

Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's." See Appendix, *infra*.[1]

Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.

---

[1] At the bottom of the message, the observer learns that the display was "[p]resented to the people and youth of Texas by the Fraternal Order of Eagles of Texas" in 1961. See Appendix, *infra*.

For those of us who learned to recite the King James version of the text long before we understood the meaning of some of its words, God's Commandments may seem like wise counsel. The question before this Court, however, is whether it is counsel that the State of Texas may proclaim without violating the Establishment Clause of the Constitution. If any fragment of Jefferson's metaphorical "wall of separation between church and State"[2] is to be preserved—if there remains any meaning to the "wholesome 'neutrality' of which this Court's [Establishment Clause] cases speak," *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 222 (1963)—a negative answer to that question is mandatory.

I

In my judgment, at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property. See, *e. g.*, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 650 (1989) (STEVENS, J., concurring in part and dissenting in part); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 797 (1995) (STEVENS, J., dissenting). The adornment of our public spaces with displays of religious symbols and messages undoubtedly provides comfort, even inspiration, to many individuals who subscribe to particular faiths. Unfortunately, the practice also runs the risk of "offend[ing] nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful." *Allegheny County*, 492 U. S., at 651 (STEVENS, J., concurring in part and dissenting in part).[3]

---

[2] *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879); see also *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947).

[3] As Senator Danforth recently reminded us, "efforts to haul references of God into the public square, into schools and courthouses, are far more apt to divide Americans than to advance faith." Danforth, Onward, Moderate Christian Soldiers, N. Y. Times, June 17, 2005, p. A27.

Government's obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses, which together erect a wall of separation between church and state.[4] This metaphorical wall protects principles long recognized and often recited in this Court's cases. The first and most fundamental of these principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality—government may not exercise a preference for one religious faith over another. See, *e. g.*, *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, at 874–876.[5] This essential command, however, is not merely a prohibition

---

[4] The accuracy and utility of this metaphor have been called into question. See, *e. g.*, *Wallace* v. *Jaffree*, 472 U. S. 38, 106 (1985) (REHNQUIST, J., dissenting); see generally P. Hamburger, Separation of Church and State (2002). Whatever one may think of the merits of the historical debate surrounding Jefferson and the "wall" metaphor, this Court at a minimum has never questioned the concept of the "separation of church and state" in our First Amendment jurisprudence. THE CHIEF JUSTICE's opinion affirms that principle. *Ante*, at 683 (demanding a "separation between church and state"). Indeed, even the Court that famously opined that "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952), acknowledged that "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated," *id.*, at 312. The question we face is how to give meaning to that concept of separation.

[5] There is now widespread consensus on this principle. See *Everson*, 330 U. S., at 15 ("Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another"); *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *Larson* v. *Valente*, 456 U. S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"); see also *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 748 (1994) (SCALIA, J., dissenting) ("I have always believed . . . that the Establishment Clause prohibits the favoring of one religion over others"); but see *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 470–471 (1892).

against the government's differentiation among religious sects. We have repeatedly reaffirmed that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961) (footnote omitted).[6] This principle is based on the straightforward notion that governmental promotion of orthodoxy is not saved by the aggregation of several orthodoxies under the State's banner. See *Abington*, 374 U. S., at 222.

Acknowledgments of this broad understanding of the neutrality principle are legion in our cases.[7] Strong arguments to the contrary have been raised from time to time, perhaps the strongest in then-JUSTICE REHNQUIST's scholarly dis-

---

[6] In support of this proposition, the *Torcaso* Court quoted James Iredell, who in the course of debating the adoption of the Federal Constitution in North Carolina, stated: "'[I]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?'" 367 U. S., at 495, n. 10 (quoting 4 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 194 (2d ed. 1891)).

[7] See *Everson*, 330 U. S., at 18 (the Establishment Clause "requires the state to be . . . neutral in its relations with groups of religious believers and non-believers"); *Abington*, 374 U. S., at 216 (rejecting the proposition that the Establishment Clause "forbids only governmental preference of one religion over another"); *Wallace*, 472 U. S., at 52–55 (the interest in "forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain"); cf. *Zorach*, 343 U. S., at 325 (Jackson, J., dissenting) ("The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power").

sent in *Wallace* v. *Jaffree*, 472 U. S. 38, 91–114 (1985).[8] Powerful as his argument was, we squarely rejected it and thereby reaffirmed the principle that the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith. As we wrote, "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Id.*, at 52–53.

In restating this principle, I do not discount the importance of avoiding an overly strict interpretation of the metaphor so often used to define the reach of the Establishment Clause. The plurality is correct to note that "religion and religious traditions" have played a "strong role . . . throughout our Nation's history." *Ante*, at 683. This Court has often recognized "an unbroken history of official acknowledgment . . . of the role of religion in American life." *Lynch* v. *Donnelly*, 465 U. S. 668, 674 (1984); accord, *Edwards* v. *Aguillard*, 482 U. S. 578, 606–608 (1987) (Powell, J., concurring). Given this history, it is unsurprising that a religious symbol may at times become an important feature of a familiar landscape or a reminder of an important event in the history of a community. The wall that separates the church from the State does not prohibit the government from acknowledging the religious beliefs and practices of the American people, nor does it require governments to hide works of art or historic memorabilia from public view just because they also have religious significance.

This case, however, is not about historic preservation or the mere recognition of religion. The issue is obfuscated rather than clarified by simplistic commentary on the various

---

[8] JUSTICE SCALIA's dissent in the other Ten Commandments case we decide today, see *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, at 885–894, raises similar objections. I address these objections directly in Part III.

ways in which religion has played a role in American life, see *ante*, at 683–688 (plurality opinion), and by the recitation of the many extant governmental "acknowledgments" of the role the Ten Commandments played in our Nation's heritage,[9] *ante*, at 687–689, and n. 9. Surely, the mere compilation of religious symbols, none of which includes the full text of the Commandments and all of which are exhibited in different settings, has only marginal relevance to the question presented in this case.

The monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State's refusal to remove it upon objection be explained as a simple desire to preserve a historic relic. This Nation's resolute commitment to neutrality with respect to religion is flatly inconsistent with the plurality's wholehearted validation of an official state endorsement of the message that there is one, and only one, God.

II

When the Ten Commandments monument was donated to the State of Texas in 1961, it was not for the purpose of commemorating a noteworthy event in Texas history, signi-

---

[9] Though this Court has subscribed to the view that the Ten Commandments influenced the development of Western legal thought, it has not officially endorsed the far more specific claim that the Ten Commandments played a significant role in the development of our Nation's foundational documents (and the subsidiary implication that it has special relevance to Texas). Although it is perhaps an overstatement to characterize this latter proposition as "idiotic," see Tr. of Oral Arg. 34, as one Member of the *plurality* has done, at the very least the question is a matter of intense scholarly debate. Compare Brief for Legal Historians and Law Scholars as *Amicus Curiae* in *McCreary County* v. *American Civil Liberties Union of Ky.*, O. T. 2004, No. 03–1693, with Brief for American Center for Law and Justice as *Amicus Curiae*. Whatever the historical accuracy of the proposition, the District Court categorically rejected respondents' suggestion that the State's actual purpose in displaying the Decalogue was to signify its influence on secular law and Texas institutions. App. to Pet. for Cert. 32.

fying the Commandments' influence on the development of secular law, or even denoting the religious beliefs of Texans at that time. To the contrary, the donation was only one of over a hundred largely identical monoliths, and of over a thousand paper replicas, distributed to state and local governments throughout the Nation over the course of several decades. This ambitious project was the work of the Fraternal Order of Eagles, a well-respected benevolent organization whose good works have earned the praise of several Presidents.[10]

As the story goes, the program was initiated by the late Judge E. J. Ruegemer, a Minnesota juvenile court judge and then-Chairman of the Eagles National Commission on Youth Guidance. Inspired by a juvenile offender who had never heard of the Ten Commandments, the judge approached the Minnesota Eagles with the idea of distributing paper copies of the Commandments to be posted in courthouses nationwide. The State's Aerie undertook this project and its popularity spread. When Cecil B. DeMille, who at that time was filming the movie The Ten Commandments, heard of the judge's endeavor, he teamed up with the Eagles to produce the type of granite monolith now displayed in front of the Texas Capitol and at courthouse squares, city halls, and public parks throughout the Nation. Granite was reportedly chosen over DeMille's original suggestion of bronze plaques to better replicate the original Ten Commandments.[11]

---

[10] See Brief for Fraternal Order of Eagles as *Amicus Curiae* 2–3. The Order was formed in 1898 by six Seattle theater owners, promptly joined by actors, playwrights, and stagehands, and rapidly expanded to include a nationwide membership numbering over a million. *Id.*, at 1–2; see also *Fraternal Order of Eagles, Tenino Aerie No. 564* v. *Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 229, 59 P. 3d 655, 657 (2002) (en banc); *Lahmann* v. *Grand Aerie of Fraternal Order of Eagles*, 180 Ore. App. 420, 422, 43 P. 3d 1130, 1131 (2002).

[11] See *Books* v. *Elkhart*, 235 F. 3d 292, 294–295 (CA7 2000); *State* v. *Freedom from Religion Foundation, Inc.*, 898 P. 2d 1013, 1017 (Colo. 1995) (en banc); see also U. S. Supreme Court will hear Ten Commandments

The donors were motivated by a desire to "inspire the youth" and curb juvenile delinquency by providing children with a "'code of conduct or standards by which to govern their actions.'"[12] It is the Eagles' belief that disseminating the message conveyed by the Ten Commandments will help to persuade young men and women to observe civilized standards of behavior, and will lead to more productive lives. Significantly, although the Eagles' organization is nonsectarian, eligibility for membership is premised on a belief in the existence of a "Supreme Being."[13] As described by the Eagles themselves:

> "'[I]n searching for a youth guidance program [we] recognized that there can be no better, no more defined program of Youth Guidance, and adult guidance as well, than the laws handed down by God Himself to Moses more than 3000 years ago, which laws have stood unchanged through the years. They are a fundamental part of our lives, the basis of all our laws for living, the foundation of our relationship with our Creator, with our families and with our fellow men. All the concepts we

---

Case in Early 2005, http://www.foe.com/tencommandments/index.html (all Internet materials as visited June 24, 2005, and available in Clerk of Court's case file).

[12] Brief for Fraternal Order of Eagles as *Amicus Curiae* 4; *Freedom from Religion Foundation*, 898 P. 2d, at 1017; accord, Tex. S. Con. Res. 16, 57th Leg., Reg. Sess. (1961) ("These plaques and monoliths have been presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency").

[13] According to its articles of incorporation, the Eagles' purpose is to: "'[U]nite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality . . . .'" *Fraternal Order of Eagles*, 148 Wash. 2d, at 229, 59 P. 3d, at 657. See also Aerie Membership Application–Fraternal Order of Eagles, http://www.foe.com/membership/applications/aerie.html ("I, being of sound body and mind, and believing in the existence of a Supreme Being . . . ").

live by—freedom, democracy, justice, honor—are rooted in the Ten Commandments.

. . . . .

"'The erection of these monoliths is to inspire all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life.'" *Anderson* v. *Salt Lake City Corp.*, 348 F. Supp. 1170, 1172 (Utah 1972), rev'd, 475 F. 2d 29 (CA10 1973).

The desire to combat juvenile delinquency by providing guidance to youths is both admirable and unquestionably secular. But achieving that goal through biblical teachings injects a religious purpose into an otherwise secular endeavor. By spreading the word of God and converting heathens to Christianity, missionaries expect to enlighten their converts, enhance their satisfaction with life, and improve their behavior. Similarly, by disseminating the "law of God"—directing fidelity to God and proscribing murder, theft, and adultery—the Eagles hope that this divine guidance will help wayward youths conform their behavior and improve their lives. In my judgment, the significant secular byproducts that are intended consequences of religious instruction—indeed, of the establishment of most religions—are not the type of "secular" purposes that justify government promulgation of sacred religious messages.

Though the State of Texas may genuinely wish to combat juvenile delinquency, and may rightly want to honor the Eagles for their efforts, it cannot effectuate these admirable purposes through an explicitly religious medium. See *Bowen* v. *Kendrick*, 487 U. S. 589, 639–640 (1988) (Blackmun, J., dissenting) ("It should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes"). The State may admonish its citizens not to lie, cheat, or steal, to honor their parents, and to respect their neighbors' property; and it may do so by printed words, in television commercials, or on granite

monuments in front of its public buildings. Moreover, the State may provide its schoolchildren and adult citizens with educational materials that explain the important role that our forebears' faith in God played in their decisions to select America as a refuge from religious persecution, to declare their independence from the British Crown, and to conceive a new Nation. See *Edwards*, 482 U. S., at 606–608 (Powell, J., concurring). The message at issue in this case, however, is fundamentally different from either a bland admonition to observe generally accepted rules of behavior or a general history lesson.

The reason this message stands apart is that the Decalogue is a venerable religious text.[14] As we held 25 years ago, it is beyond dispute that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths." *Stone* v. *Graham*, 449 U. S. 39, 41 (1980) *(per curiam)*. For many followers, the Commandments represent the literal word of God as spoken to Moses and repeated to his followers after descending from Mount Sinai. The message conveyed by the Ten Commandments thus cannot be analogized to an appendage to a common article of commerce ("In God we Trust") or an incidental part of a familiar recital ("God save the United States and this honorable Court"). Thankfully, the plurality does not attempt to minimize the religious significance of the Ten Commandments. *Ante*, at 690 ("Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain"); *ante*, at 692 (THOMAS, J., concurring); see also *McCreary County* v.

---

[14] In *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989), I noted that certain displays of religious images may convey "an equivocal message, perhaps of respect for Judaism, for religion in general, or for law." *Id.*, at 652 (opinion concurring in part and dissenting in part). It is rather misleading, however, to quote my comment in that case to imply that I was referring to the text of the Ten Commandments *simpliciter*. See *McCreary County*, *post*, at 904.

American Civil Liberties Union of Ky., post, at 909 (SCALIA, J., dissenting). Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.

The profoundly sacred message embodied by the text inscribed on the Texas monument is emphasized by the especially large letters that identify its author: "I AM the LORD thy God." See Appendix, *infra*. It commands present worship of Him and no other deity. It directs us to be guided by His teaching in the current and future conduct of all of our affairs. It instructs us to follow a code of divine law, some of which has informed and been integrated into our secular legal code ("Thou shalt not kill"), but much of which has not ("Thou shalt not make to thyself any graven images. . . . Thou shalt not covet").

Moreover, despite the Eagles' best efforts to choose a benign nondenominational text,[15] the Ten Commandments display projects not just a religious, but an inherently sectarian, message. There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous reli-

---

[15] See *ante*, at 701 (BREYER, J., concurring in judgment). Despite the Eagles' efforts, not all of the monuments they donated in fact conform to a "universally-accepted" text. Compare, *e. g.*, Appendix, *infra* (including the command that "Thou shalt not make to thyself any graven images"), and *Adland* v. *Russ*, 307 F. 3d 471, 475 (CA6 2002) (same), with *Freedom from Religion Foundation*, 898 P. 2d, at 1016 (omitting that command altogether). The distinction represents a critical divide between the Protestant and Catholic faiths. During the Reformation, Protestants destroyed images of the Virgin Mary and of Jesus Christ that were venerated in Catholic churches. Even today there is a notable difference between the imagery in different churches, a difference that may in part be attributable to differing understandings of the meaning of what is the Second Commandment in the King James Bible translation and a portion of the First Commandment in the Catholic translation. See Finkelman, The Ten Commandments on the Courthouse Lawn and Elsewhere, 73 Ford. L. Rev. 1477, 1493–1494 (2005) (hereinafter Finkelman).

gious significance.[16] See Lubet, The Ten Commandments in Alabama, 15 Constitutional Commentary 471, 474–476 (Fall 1998). In choosing to display this version of the Commandments, Texas tells the observer that the State supports this side of the doctrinal religious debate. The reasonable observer, after all, has no way of knowing that this text was the product of a compromise, or that there is a rationale of any kind for the text's selection.[17]

The Establishment Clause, if nothing else, prohibits government from "specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ." *Lee* v. *Weisman*, 505 U. S. 577, 641 (1992) (SCALIA, J., dissenting). Given that the chosen text inscribed on the Ten Commandments monument invariably places the State at the center of a serious

---

[16] For example, in the Jewish version of the Sixth Commandment God commands: "You shall not murder"; whereas, the King James interpretation of the same command is: "Thou shalt not kill." Compare W. Plaut, The Torah: A Modern Commentary 534 (1981), with Appendix, *infra*. The difference between the two versions is not merely semantic; rather, it is but one example of a deep theological dispute. See Finkelman 1481–1500; Maier, Enumerating the Decalogue: Do We Number the Ten Commandments Correctly? 16 Concordia J. 18, 18–26 (1990). Varying interpretations of this Commandment explain the actions of vegetarians who refuse to eat meat, pacifists who refuse to work for munitions makers, prison officials who refuse to administer lethal injections to death row inmates, and pharmacists who refuse to sell morning-after pills to women. See Finkelman 1494–1496; Brief for American Jewish Congress et al. as *Amici Curiae* 22–23. Although the command is ambiguous, its power to motivate like-minded interpreters of its message cannot be denied.

[17] JUSTICE SCALIA's willingness to dismiss the distinct textual versions adhered to by different faiths in the name of generic "monotheism" based on mere speculation regarding their significance, *McCreary County*, *post*, at 909, is not only somewhat ironic, see A. Scalia, A Matter of Interpretation 23–25 (1997), but also serves to reinforce the concern that interjecting government into the religious sphere will offend "adherents who consider the particular advertisement disrespectful," *Allegheny County*, 492 U. S., at 651 (STEVENS, J., concurring in part and dissenting in part).

sectarian dispute, the display is unquestionably unconstitutional under our case law. See *Larson* v. *Valente*, 456 U. S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

Even if, however, the message of the monument, despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely, a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism.[18] See, *e. g.*, *Allegheny County*, 492 U. S., at 615 (opinion of Blackmun, J.) ("The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone"). And, at the very least, the text of the Ten Commandments impermissibly commands a preference for religion over irreligion. See, *e. g.*, *id.*, at 590 (The Establishment Clause "guarantee[s] religious liberty and equality to 'the infidel, the atheist, or the adherent

---

[18] See Brief for Hindu American Foundation et al. as *Amici Curiae*. Though JUSTICE SCALIA disagrees that these sentiments are consistent with the Establishment Clause, he does not deny that our cases wholeheartedly adopt this expression of neutrality. Instead, he suggests that this Court simply discard what he terms the "say-so of earlier Courts," based in part on his own "say-so" that nonmonotheists make up a statistically insignificant portion of this Nation's religious community. *McCreary County*, *post*, at 889. Besides marginalizing the belief systems of more than 7 million Americans by deeming them unworthy of the special protections he offers monotheists under the Establishment Clause, JUSTICE SCALIA's measure of analysis may be cause for concern even for the self-proclaimed "popular" religions of Islam and Judaism. The number of Buddhists alone is nearly equal to the number of Muslims in this country, and while those of the Islamic and Jewish faiths only account for 2.2% of all believers, Christianity accounts for 95.5%. See U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2004–2005, p. 55 (124th ed. 2004) (Table No. 67).

of a non-Christian faith such as Islam or Judaism'" (quoting *Wallace*, 472 U. S., at 52)). Any of those bases, in my judgment, would be sufficient to conclude that the message should not be proclaimed by the State of Texas on a permanent monument at the seat of its government.

I do not doubt that some Texans, including those elected to the Texas Legislature, may believe that the statues displayed on the Texas Capitol grounds, including the Ten Commandments monument, reflect the "ideals . . . that compose Texan identity." Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001). But Texas, like our entire country, is now a much more diversified community than it was when it became a part of the United States or even when the monument was erected. Today there are many Texans who do not believe in the God whose Commandments are displayed at their seat of government. Many of them worship a different god or no god at all. Some may believe that the account of the creation in the Book of Genesis is less reliable than the views of men like Darwin and Einstein. The monument is no more an expression of the views of every true Texan than was the "Live Free or Die" motto that the State of New Hampshire placed on its license plates in 1969 an accurate expression of the views of every citizen of New Hampshire. See *Wooley* v. *Maynard*, 430 U. S. 705 (1977).

Recognizing the diversity of religious and secular beliefs held by Texans and by all Americans, it seems beyond peradventure that allowing the seat of government to serve as a stage for the propagation of an unmistakably Judeo-Christian message of piety would have the tendency to make nonmonotheists and nonbelievers "feel like [outsiders] in matters of faith, and [strangers] in the political community." *Pinette*, 515 U. S., at 799 (STEVENS, J., dissenting). "[D]isplays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal." *Allegheny County*, 492

U. S., at 651 (STEVENS, J., concurring in part and dissenting in part).[19]

Even more than the display of a religious symbol on government property, see *Pinette*, 515 U. S., at 797 (STEVENS, J., dissenting); *Allegheny County*, 492 U. S., at 650–651 (STEVENS, J., concurring in part and dissenting in part), displaying this sectarian text at the state capitol should invoke a powerful presumption of invalidity. As JUSTICE SOUTER's opinion persuasively demonstrates, the physical setting in which the Texas monument is displayed—far from rebutting that presumption—actually enhances the religious content of its message. See *post*, at 742–743 (dissenting opinion). The monument's permanent fixture at the seat of Texas government is of immense significance. The fact that a monument

> "is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of the government itself. The 'reasonable observer' of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory—has sponsored and facilitated its message." *Pinette*, 515 U. S., at 801–802 (STEVENS, J., dissenting).

Critical examination of the Decalogue's prominent display at the seat of Texas government, rather than generic citation

---

[19] The fact that this particular display has stood unchallenged for over 40 years does not suggest otherwise. One need look no further than the deluge of cases flooding lower courts to realize the discord these displays have engendered. See, *e. g.*, *Mercier* v. *Fraternal Order of Eagles*, 395 F. 3d 693 (CA7 2005); *ACLU Nebraska Foundation* v. *Plattsmouth*, 358 F. 3d 1020 (CA8 2004); *Adland* v. *Russ*, 307 F. 3d 471 (CA6 2002); *Summum* v. *Ogden*, 297 F. 3d 995 (CA10 2002); *Books* v. *Elkhart*, 235 F. 3d 292 (CA7 2000); *State* v. *Freedom From Religion Foundation, Inc.*, 898 P. 2d 1013 (Colo. 1995); *Anderson* v. *Salt Lake City Corp.*, 475 F. 2d 29 (CA10 1973).

to the role of religion in American life, unmistakably reveals on which side of the "slippery slope," *ante*, at 704 (BREYER, J., concurring in judgment), this display must fall. God, as the author of its message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner, speak with one voice for a common purpose—to encourage Texans to abide by the divine code of a "Judeo-Christian" God. If this message is permissible, then the shining principle of neutrality to which we have long adhered is nothing more than mere shadow.

III

The plurality relies heavily on the fact that our Republic was founded, and has been governed since its nascence, by leaders who spoke then (and speak still) in plainly religious rhetoric. THE CHIEF JUSTICE cites, for instance, George Washington's 1789 Thanksgiving Proclamation in support of the proposition that the Establishment Clause does not proscribe official recognition of God's role in our Nation's heritage, *ante*, at 687.[20] Further, the plurality emphatically endorses the seemingly timeless recognition that our "institutions presuppose a Supreme Being," *ante*, at 683. Many of the submissions made to this Court by the parties and *amici*, in accord with the plurality's opinion, have relied on the ubiquity of references to God throughout our history.

The speeches and rhetoric characteristic of the founding era, however, do not answer the question before us. I have already explained why Texas' display of the full text of the Ten Commandments, given the content of the actual display

---

[20] This is, of course, a rhetorical approach not unique to the plurality's opinion today. Appeals to such religious speeches have frequently been used in support of governmental transmission of religious messages. See, *e. g.*, *Wallace*, 472 U. S., at 98–104 (REHNQUIST, J., dissenting); *Lee* v. *Weisman*, 505 U. S. 577, 633–636 (1992) (SCALIA, J., dissenting); *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 318 (2000) (REHNQUIST, C. J., dissenting); cf. *Lynch* v. *Donnelly*, 465 U. S. 668, 675–676 (1984).

and the context in which it is situated, sets this case apart from the countless examples of benign government recognitions of religion. But there is another crucial difference. Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents. Thus, when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.[21] The permanent placement of a textual religious display on state property is different in kind; it amalgamates otherwise discordant individual views into a collective statement of government approval. Moreover, the message never ceases to transmit itself to objecting viewers whose only choices are to accept the message or to ignore the offense by averting their gaze. Cf. *Allegheny County*, 492 U. S., at 664 (KENNEDY, J., concurring in judgment in part and dissenting in part); *ante*, at 695 (THOMAS, J., concurring). In this sense, although Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed.[22]

---

[21] It goes without saying that the analysis differs when a listener is coerced into listening to a prayer. See, *e. g.*, *Santa Fe Independent School Dist.*, 530 U. S., at 308–312.

[22] With respect to the "legislative prayers" cited approvingly by THE CHIEF JUSTICE, *ante*, at 687–688, I reiterate my view that "the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause." *Marsh* v. *Chambers*, 463 U. S. 783, 823 (1983) (STEVENS, J., dissenting). Thus, JUSTICE SCALIA and I are in agreement with respect to at least one point—this Court's decision in *Marsh* "ignor[ed] the neutrality principle" at the heart of the Establishment Clause. *McCreary County*, *post*, at 892 (SCALIA, J., dissenting).

The plurality's reliance on early religious statements and proclamations made by the Founders is also problematic because those views were not espoused at the Constitutional Convention in 1787[23] nor enshrined in the Constitution's text. Thus, the presentation of these religious statements as a unified historical narrative is bound to paint a misleading picture. It does so here. In according deference to the statements of George Washington and John Adams, THE CHIEF JUSTICE and JUSTICE SCALIA, see *ante*, at 687 (plurality opinion); *McCreary County*, *post*, at 886, 887–888 (dissenting opinion), fail to account for the acts and publicly espoused views of other influential leaders of that time. Notably absent from their historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause.[24] THE CHIEF JUSTICE and JUSTICE SCALIA disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite, see, *e. g.*, Letter from James Madison to Edward Livingston (July 10, 1822), in 5 Founders' Constitution 105–106 (arguing that Congress' appointment of Chaplains to be paid from the National Treasury was "not with my approbation" and was a "deviation" from the principle of "immunity of Religion from civil

---

[23] See, *e. g.*, J. Hutson, Religion and the Founding of the American Republic 75 (1998) (noting the dearth of references to God at the Philadelphia Convention and that many contemporaneous observers of the Convention complained that "the Framers had unaccountably turned their backs on the Almighty" because they "'found the Constitution without any acknowledgement of God'").

[24] See Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 The Founders' Constitution 98 (P. Kurland & R. Lerner eds. 1987) (hereinafter Founders' Constitution); 11 Jefferson's Writings 428–430 (1905); see also *Lee*, 505 U. S., at 623–625 (SOUTER, J., concurring) (documenting history); *Lynch*, 465 U. S., at 716, n. 23 (Brennan, J., dissenting) (same).

jurisdiction"),[25] and paper over the fact that Madison more than once repudiated the views attributed to him by many, stating unequivocally that with respect to government's involvement with religion, the "'tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference, in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others.'"[26]

These seemingly nonconforming sentiments should come as no surprise. Not insignificant numbers of colonists came to this country with memories of religious persecution by

---

[25] See also James Madison, Detached Memoranda, in 5 Founders' Constitution 103–104. Madison's letter to Livingston further argued: "There has been another deviation from the strict principle in the Executive Proclamations of fasts & festivals, so far, at least, as they have spoken the language of *injunction*, or have lost sight of the equality of *all* religious sects in the eve of the Constitution. . . . Notwithstanding the general progress made within the two last centuries in favour of this branch of liberty, & the full establishment of it, in some parts of our Country, there remains in others a strong bias towards the old error, that without some sort of alliance or coalition between [Government] & Religion neither can be duly supported. Such indeed is the tendency to such a coalition, and such its corrupting influence on both the parties, that the danger cannot be too carefully guarded [against]. . . . Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & [Government] will both exist in greater purity, the less they are mixed together." *Id.*, at 105–106.

[26] Religion and Politics in the Early Republic 20–21 (D. Dreisbach ed. 1996) (hereinafter Dreisbach) (quoting Letter from James Madison to Jasper Adams (1833)). See also Letter from James Madison to Edward Livingston (July 10, 1822), in 5 Founders' Constitution 106 ("We are teaching the world the great truth that [governments] do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of [government]").

monarchs on the other side of the Atlantic. See A. Stokes & L. Pfeffer, Church and State in the United States 3–23 (rev. 1st. ed. 1964). Others experienced religious intolerance at the hands of colonial Puritans, who regrettably failed to practice the tolerance that some of their contemporaries preached. *Engel* v. *Vitale*, 370 U. S. 421, 427–429 (1962). THE CHIEF JUSTICE and JUSTICE SCALIA ignore the separationist impulses—in accord with the principle of "neutrality"—that these individuals brought to the debates surrounding the adoption of the Establishment Clause.[27]

Ardent separationists aside, there is another critical nuance lost in the plurality's portrayal of history. Simply put, many of the Founders who are often cited as authoritative expositors of the Constitution's original meaning understood the Establishment Clause to stand for a *narrower* proposition than the plurality, for whatever reason, is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.

The evidence is compelling. Prior to the Philadelphia Convention, the States had begun to protect "religious freedom" in their various constitutions. Many of those provisions, however, restricted "equal protection" and "free ex-

---

[27] The contrary evidence cited by THE CHIEF JUSTICE and JUSTICE SCALIA only underscores the obvious fact that leaders who have drafted and voted for a text are eminently capable of violating their own rules. The first Congress was—just as the present Congress is—capable of passing unconstitutional legislation. Thus, it is no answer to say that the Founders' separationist impulses were "plainly rejected" simply because the first Congress enacted laws that acknowledged God. See *McCreary County*, *post*, at 896 (SCALIA, J., dissenting). To adopt such an interpretive approach would misguidedly give authoritative weight to the fact that the Congress that proposed the Fourteenth Amendment also enacted laws that tolerated segregation, and the fact that 10 years after proposing the First Amendment, Congress enacted the Alien and Sedition Act, which indisputably violated our present understanding of the First Amendment. See n. 34, *infra*; *Lee*, 505 U. S., at 626 (SOUTER, J., concurring).

ercise" to Christians, and invocations of the divine were commonly understood to refer to Christ.[28] That historical background likely informed the Framers' understanding of the First Amendment. Accordingly, one influential thinker wrote of the First Amendment that "'[t]he meaning of the term "establishment" in this amendment unquestionably is, the preference and establishment given by law to one sect of Christians over every other.'" Jasper Adams, The Relation of Christianity to Civil Government in the United States (Feb. 13, 1833) (quoted in Dreisbach 16). That definition tracked the understanding of the text Justice Story adopted in his famous Commentaries, in which he wrote that the "real object" of the Clause was

> "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus sought to cut off the means of religious persecution, (the vice and pest of former ages,) and the power of subverting the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age." J. Story, Commentaries on the Constitution of the United States § 991, p. 701 (R. Rotunda & J. Nowak eds. 1987) (hereinafter Story); see also *Wallace*, 472 U. S., at 52–55, and n. 36.[29]

---

[28] See, *e. g.*, Strang, The Meaning of "Religion" in the First Amendment, 40 Duquesne L. Rev. 181, 220–223 (2002).

[29] Justice Story wrote elsewhere that "'Christianity is indispensable to the true interests & solid foundations of all free governments. I distinguish . . . between the establishment of a particular sect, as the Religion of the State, & the Establishment of Christianity itself, without any preference of any particular form of it. I know not, indeed, how any deep sense of moral obligation or accountableness can be expected to prevail in the community without a firm persuasion of the great Christian

Along these lines, for nearly a century after the founding, many accepted the idea that America was not just a *religious* Nation, but "a Christian nation." *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 471 (1892).[30]

The original understanding of the type of "religion" that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred "monotheistic" religions JUSTICE SCALIA has embraced in his *McCreary County* opinion. See *post*, at 893–894 (dissenting opinion).[31]

Truths.'" Letter to Jasper Adams (May 14, 1833) (quoted in Dreisbach 19).

[30] See 143 U. S., at 471 ("'[W]e are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of . . . imposters'" (quoting *People* v. *Ruggles*, 8 Johns. 290, 295 (N. Y. 1811))); see also *Vidal* v. *Philadelphia*, 2 How. 127, 198–199 (1844). These views should not be read as those of religious zealots. Chief Justice Marshall himself penned the historical genesis of the Court's assertion that our "institutions presuppose a Supreme Being," see *Zorach*, 343 U. S., at 313, writing that the "'American population is entirely Christian, & with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it,'" Letter from John Marshall to Jasper Adams (May 9, 1833) (quoted in Dreisbach 18–19). Accord, Story § 988, at 700 ("[A]t the time of the adoption of the constitution, . . . the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state . . . ").

[31] JUSTICE SCALIA's characterization of this conclusion as nothing more than my own personal "assurance" is misleading to say the least. *McCreary County*, *post*, at 898. Reliance on our Nation's early constitutional scholars is common in this Court's opinions. In particular, the author of the plurality once noted that "Joseph Story, a Member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared." *Wallace*, 472 U. S., at 104 (REHNQUIST, J., dissenting). And numerous opinions of this Court, including two notable opinions authored by JUSTICE SCALIA, have seen it fit to give authoritative weight to Joseph Story's treatise when interpreting other constitutional provisions. See, *e. g.*, *United States* v. *Gaudin*,

The inclusion of Jews and Muslims inside the category of constitutionally favored religions surely would have shocked Chief Justice Marshall and Justice Story. Indeed, JUSTICE SCALIA is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give specially preferred constitutional status to all monotheistic religions. Perhaps this is because the history of the Establishment Clause's original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. Generic references to "God" hardly constitute evidence that those who spoke the word meant to be inclusive of all monotheistic believers; nor do such references demonstrate that those who heard the word spoken understood it broadly to include all monotheistic faiths. See *supra*, at 726–727. JUSTICE SCALIA's inclusion of Judaism and Islam is a laudable act of religious tolerance, but it is one that is unmoored from the Constitution's history and text, and moreover one that is patently arbitrary in its inclusion of some, but exclusion of other (*e. g.*, Buddhism), widely practiced non-Christian religions. See *supra*, at 719, and n. 18 (noting that followers of Buddhism nearly equal the number of Americans who follow Islam). Given the original understanding of the men who championed our "Christian nation"—men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern—one must ask whether JUSTICE SCALIA "has not had the courage (or the foolhardiness) to apply [his originalism] principle consistently." *McCreary County*, *post*, at 890.

Indeed, to constrict narrowly the reach of the Establishment Clause to the views of the Founders would lead to more than this unpalatable result; it would also leave us with an unincorporated constitutional provision—in other words, one that limits only the *federal* establishment of "a national religion." See *Elk Grove Unified School Dist.* v. *Newdow*, 542

515 U. S. 506, 510–511 (1995) (Fifth Amendment); *Harmelin* v. *Michigan*, 501 U. S. 957, 981–982 (1991) (Eighth Amendment).

U. S. 1, 45, 50, 51 (2004) (THOMAS, J., concurring in judgment); cf. A. Amar, The Bill of Rights 36–39 (1998). Under this view, not only could a State constitutionally adorn all of its public spaces with crucifixes or passages from the New Testament, it would also have full authority to prescribe the teachings of Martin Luther or Joseph Smith as *the* official state religion. Only the Federal Government would be prohibited from taking sides (and only then as between Christian sects).

A reading of the First Amendment dependent on either of the purported original meanings expressed above would eviscerate the heart of the Establishment Clause. It would replace Jefferson's "wall of separation" with a perverse wall of exclusion—Christians inside, non-Christians out. It would permit States to construct walls of their own choosing—Baptists inside, Mormons out; Jewish Orthodox inside, Jewish Reform out. A Clause so understood might be faithful to the expectations of some of our Founders, but it is plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance. Cf. *Abington*, 374 U. S., at 214; *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 720, 723 (2002) (BREYER, J., dissenting).

Unless one is willing to renounce over 65 years of Establishment Clause jurisprudence and cross back over the incorporation bridge, see *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), appeals to the religiosity of the Framers ring hollow.[32] But even if there were a coherent way to embrace

[32] JUSTICE SCALIA's answer—that incorporation does not empty "the incorporated provisions of their original meaning," *McCreary County*, *post*, at 898—ignores the fact that the Establishment Clause has its own unique history. There is no evidence, for example, that incorporation of the Confrontation Clause ran contrary to the core of the Clause's original understanding. There is, however, some persuasive evidence to this effect regarding the Establishment Clause. See *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 49 (2004) (THOMAS, J., concurring in judgment) (arguing that the Clause was originally understood to be a "federalism

incorporation with one hand while steadfastly abiding by the Founders' purported religious views on the other, the problem of the selective use of history remains. As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.[33]

It is our duty, therefore, to interpret the First Amendment's command that "Congress shall make no law respecting an establishment of religion" not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today. As we have said in the context of statutory interpretation, legislation "often [goes] beyond the principal evil [at which the statute was aimed] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the princi-

---

provision" intended to prevent "Congress from interfering with state establishments"). It is this unique history, not incorporation writ large, that renders incoherent the postincorporation reliance on the Establishment Clause's original understanding.

JUSTICE THOMAS, at least, has faced this problem head on. See *id.*, at 45 (opinion concurring in judgment). But even if the decision to incorporate the Establishment Clause was misguided, it is at this point unwise to reverse course given the weight of precedent that would have to be cast aside to reach the intended result. See B. Cardozo, The Nature of the Judicial Process 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case").

[33] See *Lee*, 505 U. S., at 626 (SOUTER, J., concurring) ("[A]t best, . . . the Framers simply did not share a common understanding of the Establishment Clause," and at worst, their overtly religious proclamations show "that they . . . could raise constitutional ideals one day and turn their backs on them the next"); *Lynch*, 465 U. S., at 716 (Brennan, J., dissenting) (same); cf. Feldman, Intellectual Origins of the Establishment Clause, 77 N. Y. U. L. Rev. 346, 404–405 (2002) (noting that, for the Framers, "the term 'establishment' was a contested one" and that the word "was used in both narrow and expansive ways in the debates of the time").

pal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998). In similar fashion, we have construed the Equal Protection Clause of the Fourteenth Amendment to prohibit segregated schools, see *Brown* v. *Board of Education*, 349 U. S. 294 (1955), even though those who drafted that Amendment evidently thought that separate was not unequal.[34] We have held that the same Amendment prohibits discrimination against individuals on account of their gender, *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), despite the fact that the contemporaries of the Amendment "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," *Slaughter-House Cases*, 16 Wall. 36, 81 (1873). And we have construed "evolving standards of decency" to make impermissible practices that were not considered "cruel and unusual" at the founding. See *Roper* v. *Simmons*, 543 U. S. 551, 587 (2005) (STEVENS, J., concurring).

To reason from the broad principles contained in the Constitution does not, as JUSTICE SCALIA suggests, require us to abandon our heritage in favor of unprincipled expressions of personal preference. The task of applying the broad principles that the Framers wrote into the text of the First Amendment is, in any event, no more a matter of personal preference than is one's selection between two (or more) sides in a heated historical debate. We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye toward our Nation's history and the other fixed on its democratic aspirations. See *McCulloch* v.

---

[34] See Hovenkamp, The Cultural Crises of the Fuller Court, 104 Yale L. J. 2309, 2337–2342 (1995) ("Equal protection had not been identified with social integration when the Fourteenth Amendment was drafted in 1866, nor when it was ratified in 1868, nor when *Plessy* [v. *Ferguson*, 163 U. S. 537,] was decided in 1896"); see also 1 L. Tribe, American Constitutional Law § 1–14, pp. 54–55, and n. 19 (3d ed. 2000) (collecting scholarship).

Maryland, 4 Wheat. 316, 407, 415 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding" that is intended to "endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs"). Constitutions, after all,

> "are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas." *Weems* v. *United States*, 217 U. S. 349, 373 (1910).

The principle that guides my analysis is neutrality.[35] The basis for that principle is firmly rooted in our Nation's

---

[35] JUSTICE THOMAS contends that the Establishment Clause cannot include such a neutrality principle because the Clause reaches only the governmental coercion of individual belief or disbelief. *Ante*, at 693–694 (concurring opinion). In my view, although actual religious coercion is undoubtedly forbidden by the Establishment Clause, that cannot be the full extent of the provision's reach. Jefferson's "wall" metaphor and his refusal to issue Thanksgiving proclamations, see *supra*, at 724, would have been nonsensical if the Clause reached only direct coercion. Further, under the "coercion" view, the Establishment Clause would amount to little more than a replica of our compelled speech doctrine, see, *e. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 639 (1943), with a religious flavor. A Clause so interpreted would not prohibit explicit state endorsements of religious orthodoxies of particular sects, actions that lie at the heart of what the Clause was meant to regulate. The government could, for example, take out television advertisements lauding Catholicism as the only pure religion. Under the reasoning endorsed by JUSTICE THOMAS,

history and our Constitution's text. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians. But cf. Letter from George Washington to the Hebrew Congregation in Newport, R. I. (Aug. 18, 1790), in 6 Papers of George Washington 284, 285 (D. Twohig ed. 1996). Fortunately, we are not bound by the Framers' expectations—we are bound by the legal principles they enshrined in our Constitution. Story's vision that States should not discriminate between Christian sects has as its foundation the principle that government must remain neutral between valid systems of belief. As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems. The evil of discriminating today against atheists, "polytheists[,] and believers in unconcerned deities," *McCreary County*, *post*, at 893 (SCALIA, J., dissenting), is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause

---

those programs would not be coercive because the viewer could simply turn off the television or ignore the ad. See *ante*, at 694 ("The mere presence of the monument . . . involves no coercion" because the passerby "need not stop to read it or even to look at it").

Further, the notion that the application of a "coercion" principle would somehow lead to a more consistent jurisprudence is dubious. Enshrining coercion as the Establishment Clause touchstone fails to eliminate the difficult judgment calls regarding "the form that coercion must take." *McCreary County*, *post*, at 909 (SCALIA, J., dissenting). Coercion may seem obvious to some, while appearing nonexistent to others. Compare *Santa Fe Independent School Dist.*, 530 U. S., at 312, with *Lee*, 505 U. S., at 642 (SCALIA, J., dissenting). It may be a legal requirement or an effect that is indirectly inferred from a variety of factors. See, *e. g.*, *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain"). In short, "reasonable people could, and no doubt would, argue about whether coercion existed in a particular situation." Feldman, 77 N. Y. U. L. Rev., at 415.

thus forbids it and, in turn, prohibits Texas from displaying the Ten Commandments monument the plurality so casually affirms.

IV

The Eagles may donate as many monuments as they choose to be displayed in front of Protestant churches, benevolent organizations' meeting places, or on the front lawns of private citizens. The expurgated text of the King James version of the Ten Commandments that they have crafted is unlikely to be accepted by Catholic parishes, Jewish synagogues, or even some Protestant denominations, but the message they seek to convey is surely more compatible with church property than with property that is located on the government side of the metaphorical wall.

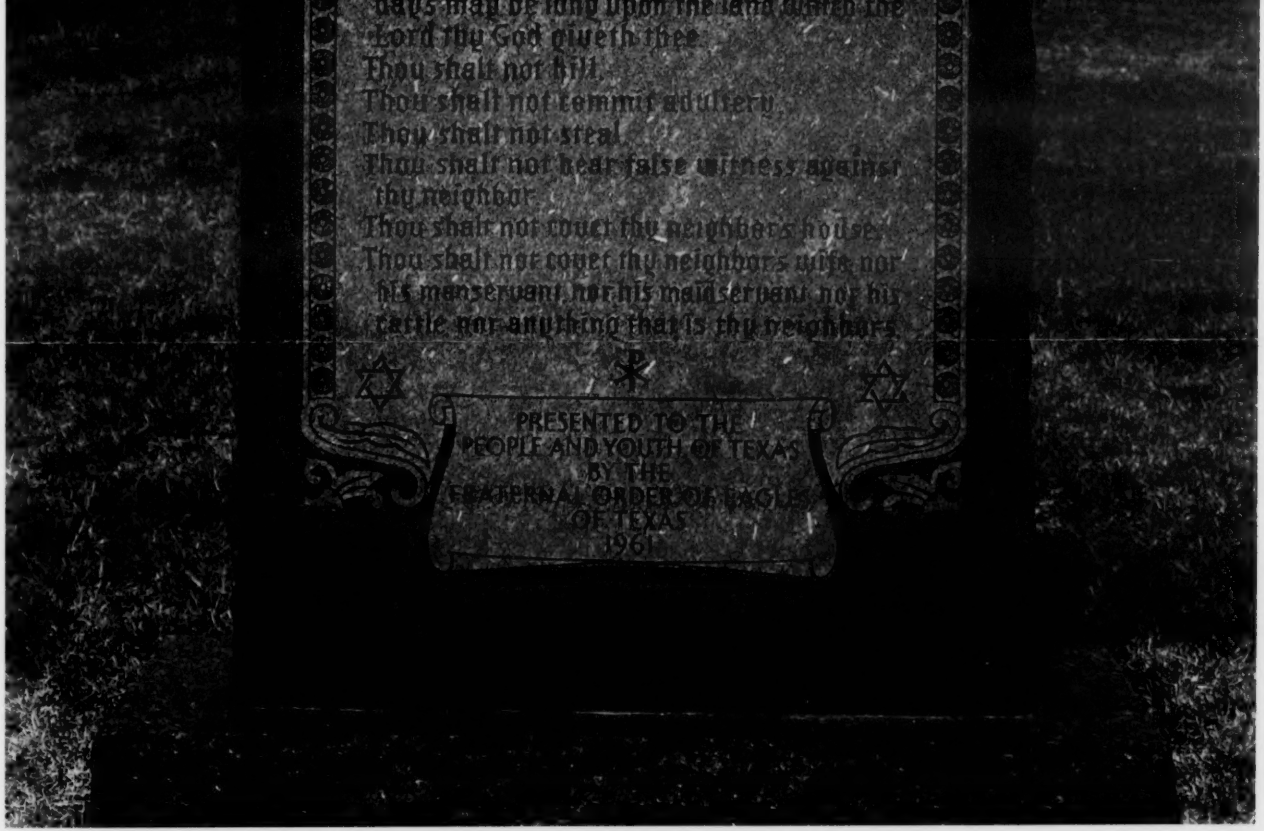
The judgment of the Court in this case stands for the proposition that the Constitution permits governmental displays of sacred religious texts. This makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion. If a State may endorse a particular deity's command to "have no other gods before me," it is difficult to conceive of any textual display that would run afoul of the Establishment Clause.

The disconnect between this Court's approval of Texas' monument and the constitutional prohibition against preferring religion to irreligion cannot be reduced to the exercise of plotting two adjacent locations on a slippery slope. Cf. *ante*, at 704 (BREYER, J., concurring in judgment). Rather, it is the difference between the shelter of a fortress and exposure to "the winds that would blow" if the wall were allowed to crumble. See *TVA* v. *Hill*, 437 U. S. 153, 195 (1978) (internal quotation marks omitted). That wall, however imperfect, remains worth preserving.

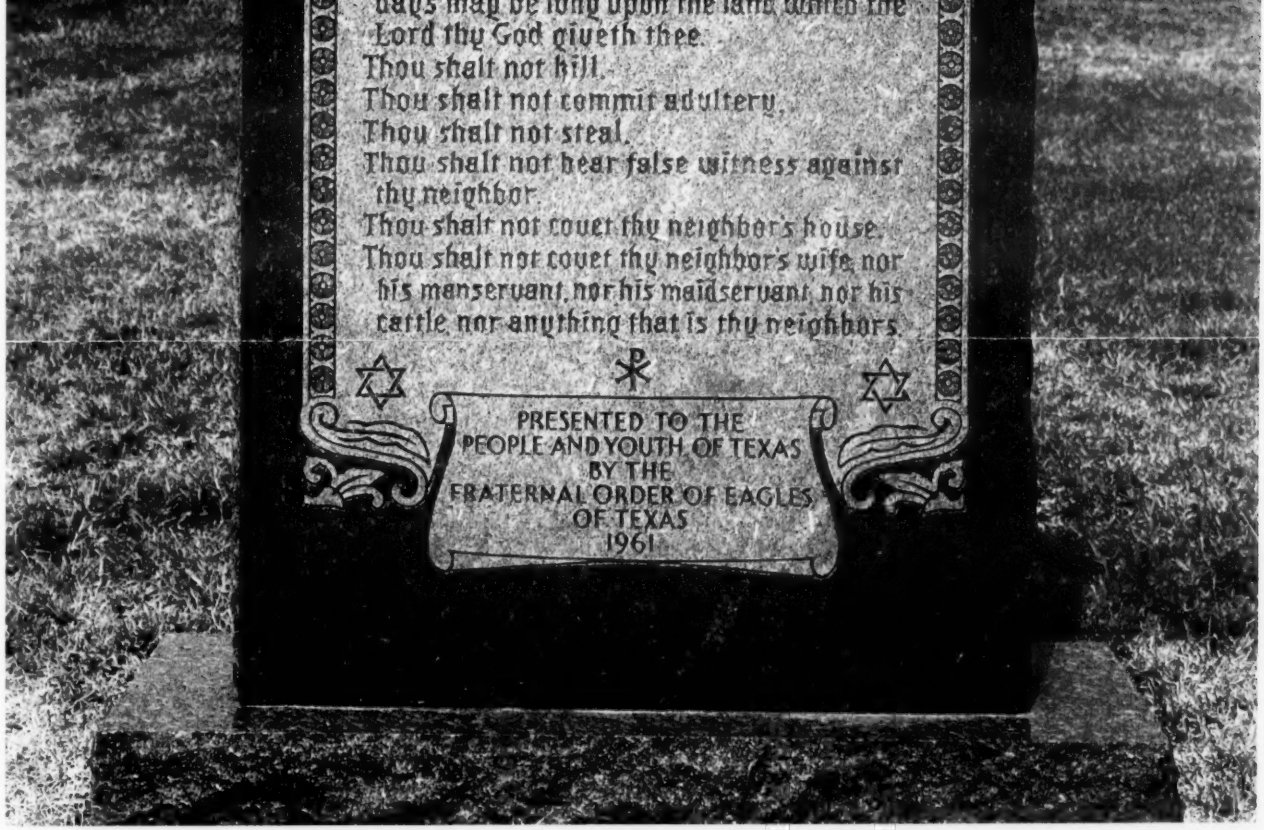
I respectfully dissent.

[Appendix to opinion of STEVENS, J., follows this page.]

APPENDIX TO OPINION OF STEVENS, J.


days may be long upon the land which the
Lord thy God giveth thee
Thou shalt not kill
Thou shalt not commit adultery
Thou shalt not steal
Thou shalt not bear false witness against
thy neighbor
Thou shalt not covet thy neighbors house
Thou shalt not covet thy neighbors wife nor
his manservant nor his maidservant nor his
cattle nor anything that is thy neighbors
PRESENTED TO THE
PEOPLE AND YOUTH OF TEXAS
BY THE
FRATERNAL ORDER OF EAGLES
OF TEXAS
1961

the Ten Commandments
I AM the LORD thy God.
Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven images.
Thou shalt not take the Name of the Lord thy God in vain.
Remember the Sabbath day, to keep it holy.
Honor thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee.


days may be long upon the land which the
Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against
thy neighbor.
Thou shalt not covet thy neighbor's house.
Thou shalt not covet thy neighbor's wife, nor
his manservant, nor his maidservant, nor his
cattle, nor anything that is thy neighbors.
PRESENTED TO THE
PEOPLE AND YOUTH OF TEXAS
BY THE
FRATERNAL ORDER OF EAGLES
OF TEXAS
1961

JUSTICE O'CONNOR, dissenting.

For essentially the reasons given by JUSTICE SOUTER, *post* this page (dissenting opinion), as well as the reasons given in my concurrence in *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, p. 881, I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

Although the First Amendment's Religion Clauses have not been read to mandate absolute governmental neutrality toward religion, cf. *Sherbert* v. *Verner*, 374 U. S. 398 (1963), the Establishment Clause requires neutrality as a general rule, *e. g.*, *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 18 (1947), and thus expresses Madison's condemnation of "employ[ing] Religion as an engine of Civil policy," Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 187 (G. Hunt ed. 1901). A governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others.

Until today, only one of our cases addressed the constitutionality of posting the Ten Commandments, *Stone* v. *Graham*, 449 U. S. 39, 41–42 (1980) *(per curiam)*. A Kentucky statute required posting the Commandments on the walls of public school classrooms, and the Court described the State's purpose (relevant under the tripartite test laid out in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971)) as being at odds with the obligation of religious neutrality.

> "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not con-

> fine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." 449 U. S., at 41–42 (footnote and citations omitted).

What these observations underscore are the simple realities that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same.[1]

Thus, a pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones. In this case, moreover, the text is presented to give particular prominence to the Commandments' first sectarian

---

[1] The clarity of the religious manifestation in *Stone* was unaffected by the State's effort to obscure it: the Kentucky statute that mandated posting the Commandments in classrooms also required the addition to every posting of a notation reading, "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 449 U. S., at 39–40, n. 1 (internal quotation marks omitted).

In the present case, the religious purpose was evident on the part of the donating organization. When the Fraternal Order of Eagles, the group that gave the monument to the State of Texas, donated identical monuments to other jurisdictions, it was seeking to impart a religious message. See *Adland* v. *Russ*, 307 F. 3d 471, 475 (CA6 2002) (quoting the Eagles' statement in a letter written to Kentucky when a monument was donated to that Commonwealth: "'Most of today's younger generation either have not seen the Ten Commandments or have not been taught them. In our opinion the youth of today is in dire need of learning the simple laws of God . . . '"). Accordingly, it was not just the terms of the moral code, but the proclamation that the terms of the code were enjoined by God, that the Eagles put forward in the monuments they donated.

reference, "I am the Lord thy God." That proclamation is centered on the stone and written in slightly larger letters than the subsequent recitation. To ensure that the religious nature of the monument is clear to even the most casual passerby, the word "Lord" appears in all capital letters (as does the word "am"), so that the most eye-catching segment of the quotation is the declaration "I AM the LORD thy God." App. to Pet. for Cert. 21. What follows, of course, are the rules against other gods, graven images, vain swearing, and Sabbath breaking. And the full text of the fifth Commandment puts forward filial respect as a condition of long life in the land "which the Lord thy God giveth thee." See *ibid.* These "words . . . make [the] religious meaning unmistakably clear." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 598 (1989).

To drive the religious point home, and identify the message as religious to any viewer who failed to read the text, the engraved quotation is framed by religious symbols: two tablets with what appears to be ancient script on them, two Stars of David, and the superimposed Greek letters Chi and Rho as the familiar monogram of Christ. Nothing on the monument, in fact, detracts from its religious nature,[2] see *ibid.* ("Here, unlike in *Lynch* [v. *Donnelly*, 465 U. S. 668 (1984)], nothing in the context of the display detracts from the crèche's religious message"), and the plurality does not suggest otherwise. It would therefore be difficult to miss the point that the government of Texas[3] is telling everyone

[2] That the monument also surrounds the text of the Commandments with various American symbols (notably the U. S. flag and a bald eagle) only underscores the impermissibility of Texas's actions: by juxtaposing these patriotic symbols with the Commandments and other religious signs, the monument sends the message that being American means being religious (and not just being religious but also subscribing to the Commandments, *i. e.*, practicing a monotheistic religion).

[3] There is no question that the State in its own right is broadcasting the religious message. When Texas accepted the monument from the Eagles, the state legislature, aware that the Eagles "for the past several years

who sees the monument to live up to a moral code because God requires it, with both code and conception of God being rightly understood as the inheritances specifically of Jews and Christians. And it is likewise unsurprising that the District Court expressly rejected Texas's argument that the State's purpose in placing the monument on the Capitol grounds was related to the Commandments' role as "part of the foundation of modern secular law in Texas and elsewhere." App. to Pet. for Cert. 32.

The monument's presentation of the Commandments with religious text emphasized and enhanced stands in contrast to any number of perfectly constitutional depictions of them, the frieze of our own Courtroom providing a good example, where the figure of Moses stands among history's great lawgivers. While Moses holds the tablets of the Commandments showing some Hebrew text, no one looking at the lines of figures in marble relief is likely to see a religious purpose behind the assemblage or take away a religious message from it. Only one other depiction represents a religious leader, and the historical personages are mixed with symbols of moral and intellectual abstractions like Equity and Authority. See *County of Allegheny, supra*, at 652 (STEVENS, J., concurring in part and dissenting in part). Since Moses enjoys no especial prominence on the frieze, viewers can readily take him to be there as a lawgiver in the company of other lawgivers; and the viewers may just as naturally see the tablets of the Commandments (showing the later ones, forbidding things like killing and theft, but without the divine preface) as background from which the concept of law

---

have placed across the country . . . parchment plaques and granite monoliths of the Ten Commandments [in order] to promote youth morality and to help stop the alarming increase in delinquency," resolved "that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation." App. 97. The State, then, expressly approved of the Eagles' proselytizing, which it made on its own.

emerged, ultimately having a secular influence in the history of the Nation. Government may, of course, constitutionally call attention to this influence, and may post displays or erect monuments recounting this aspect of our history no less than any other, so long as there is a context and that context is historical. Hence, a display of the Commandments accompanied by an exposition of how they have influenced modern law would most likely be constitutionally unobjectionable.[4]

---

[4] For similar reasons, the other displays of the Commandments that the plurality mentions, *ante*, at 688–689, do not run afoul of the Establishment Clause. The statues of Moses and St. Paul in the Main Reading Room of the Library of Congress are 2 of 16 set in close proximity, statues that "represent men illustrious in the various forms of thought and activity . . . ." The Library of Congress: The Art and Architecture of the Thomas Jefferson Building 127 (J. Cole and H. Reeds eds. 1997). Moses and St. Paul represent religion, while the other 14 (a group that includes Beethoven, Shakespeare, Michelangelo, Columbus, and Plato) represent the nonreligious categories of philosophy, art, history, commerce, science, law, and poetry. *Ibid.* Similarly, the sculpture of the woman beside the Decalogue in the Main Reading Room is 1 of 8 such figures "represent[ing] eight characteristic features of civilized life and thought," the same 8 features (7 of them nonreligious) that Moses, St. Paul, and the rest of the 16 statues represent. *Id.*, at 125.

The inlay on the floor of the National Archives Building is one of four such discs, the collective theme of which is not religious. Rather, the discs "symbolize the various types of Government records that were to come into the National Archives." Letter from Judith A. Koucky, Archivist, Records Control Section, to Catherine Millard (Oct. 1, 2003), http://www.christianheritagemins.org/articles/Ten_Commandments/Letter_archivist.htm (as visited June 16, 2005, and available in Clerk of Court's case file). (The four categories are war and defense, history, justice, and legislation. Each disc is paired with a winged figure; the disc containing the depiction of the Commandments, a depiction that, notably, omits the Commandments' text, is paired with a figure representing legislation. *Ibid.*)

As for Moses's "prominen[t] featur[ing] in the Chamber of the United States House of Representatives," *ante*, at 689 (plurality opinion), Moses is actually 1 of 23 portraits encircling the House Chamber, each approximately the same size, having no religious theme. The portraits depict "men noted in history for the part they played in the evolution of what

And the Decalogue could, as *Stone* suggested, be integrated constitutionally into a course of study in public schools. 449 U. S., at 42.[5]

Texas seeks to take advantage of the recognition that visual symbol and written text can manifest a secular purpose in secular company, when it argues that its monument (like Moses in the frieze) is not alone and ought to be viewed as only 1 among 17 placed on the 22 acres surrounding the State Capitol. Texas, indeed, says that the Capitol grounds are like a museum for a collection of exhibits, the kind of setting that several Members of the Court have said can render the exhibition of religious artifacts permissible, even though in other circumstances their display would be seen as meant to convey a religious message forbidden to the State. *County of Allegheny*, 492 U. S., at 595 (opinion of Blackmun, J., joined by STEVENS, J.); *Lynch* v. *Donnelly*, 465 U. S. 668, 692 (1984) (O'CONNOR, J., concurring). So, for example, the Government of the United States does not violate the Establishment Clause by hanging Giotto's Madonna on the wall of the National Gallery.

But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently

---

has become American law." Art in the United States Capitol, House Doc. No. 94–660, p. 282 (1978). More importantly for purposes of this case, each portrait consists only of the subject's face; the Ten Commandments appear nowhere in Moses's portrait.

[5] Similarly permissible, though obviously of a different character, are laws that can be traced back to the Commandments (even the more religious ones) but are currently supported by nonreligious considerations. See *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, at 861 (opinion of the Court) (noting that in *McGowan* v. *Maryland*, 366 U. S. 420 (1961), the Court "upheld Sunday closing statutes on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws").

than fortuity and the edge of the grass. One monument expresses admiration for pioneer women. One pays respect to the fighters of World War II. And one quotes the God of Abraham whose command is the sanction for moral law. The themes are individual grit, patriotic courage, and God as the source of Jewish and Christian morality; there is no common denominator. In like circumstances, we rejected an argument similar to the State's, noting in *County of Allegheny* that "[t]he presence of Santas or other Christmas decorations elsewhere in the . . . [c]ourthouse, and of the nearby gallery forum, fail to negate the [crèche's] endorsement effect. . . . The record demonstrates . . . that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building." 492 U. S., at 598–599, n. 48.[6]

If the State's museum argument does nothing to blunt the religious message and manifestly religious purpose behind it, neither does the plurality's reliance on generalities culled from cases factually different from this one. *E. g.*, *ante*, at 687 ("We have acknowledged, for example, that 'religion has been closely identified with our history and government,' *School Dist. of Abington Township* v. *Schempp*, 374 U. S., at 212, and that '[t]he history of man is inseparable from the

---

[6] It is true that the Commandments monument is unlike the display of the Commandments considered in the other Ten Commandments case we decide today, *McCreary County*. There the Commandments were posted at the behest of the county in the first instance, whereas the State of Texas received the monument as a gift from the Eagles, which apparently conceived of the donation at the suggestion of a movie producer bent on promoting his commercial film on the Ten Commandments, *Books* v. *Elkhart*, 235 F. 3d 292, 294–295 (CA7 2000), cert. denied, 532 U. S. 1058 (2001). But this distinction fails to neutralize the apparent expression of governmental intent to promote a religious message: although the nativity scene in *County of Allegheny* was donated by the Holy Name Society, we concluded that "[n]o viewer could reasonably think that [the scene] occupies [its] location [at the seat of county government] without the support and approval of the government." 492 U. S., at 599–600.

history of religion,' *Engel* v. *Vitale*, 370 U. S. 421, 434 (1962)"). In fact, it is not until the end of its opinion that the plurality turns to the relevant precedent of *Stone*, a case actually dealing with a display of the Decalogue.

When the plurality finally does confront *Stone*, it tries to avoid the case's obvious applicability by limiting its holding to the classroom setting. The plurality claims to find authority for limiting *Stone*'s reach this way in the opinion's citations of two school-prayer cases, *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), and *Engel* v. *Vitale*, 370 U. S. 421 (1962). But *Stone* relied on those cases for widely applicable notions, not for any concept specific to schools. The opinion quoted *Schempp*'s statements that "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment," *Schempp*, *supra*, at 225, quoted in *Stone*, 449 U. S., at 42; and that "the place of the Bible as an instrument of religion cannot be gainsaid," *Schempp*, *supra*, at 224, quoted in *Stone*, *supra*, at 41, n. 3. And *Engel* was cited to support the proposition that the State was responsible for displaying the Commandments, even though their framed, printed texts were bought with private subscriptions. *Stone*, *supra*, at 42 ("[T]he mere posting of the [Commandments] under the auspices of the legislature provides the official support of the State Government that the Establishment Clause prohibits" (ellipsis and internal quotation marks omitted)). Thus, the schoolroom was beside the point of the citations, and that is presumably why the *Stone* Court failed to discuss the educational setting, as other opinions had done when school was significant. *E. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578, 584 (1987). *Stone* did not, for example, speak of children's impressionability or their captivity as an audience in a school class. In fact, *Stone*'s reasoning reached the classroom only in noting the lack of support for the claim that the State had brought the Commandments into schools in order to "integrat[e] [them] into the school curriculum." 449 U. S., at 42.

Accordingly, our numerous prior discussions of *Stone* have never treated its holding as restricted to the classroom.[7]

Nor can the plurality deflect *Stone* by calling the Texas monument "a far more passive use of [the Decalogue] than was the case in *Stone*, where the text confronted elementary school students every day." *Ante*, at 691. Placing a monument on the ground is not more "passive" than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it. The problem in *Stone* was simply that the State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it.

To be sure, Kentucky's compulsory-education law meant that the schoolchildren were forced to see the display every day, whereas many see the monument by choice, and those who customarily walk the Capitol grounds can presumably avoid it if they choose. But in my judgment (and under our often inexact Establishment Clause jurisprudence, such matters often boil down to judgment, see *ante*, at 700 (BREYER, J., concurring in judgment)), this distinction should make no difference. The monument in this case sits on the grounds of the Texas State Capitol. There is something significant in the common term "statehouse" to refer to a state capitol building: it is the civic home of every one of the State's citizens. If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own

---

[7] In any event, the fact that we have been, as the plurality says, "'particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,'" *ante*, at 691, does not of course mean that anything goes outside the schoolhouse. As cases like *County of Allegheny* and *Lynch* v. *Donnelly*, 465 U. S. 668 (1984), illustrate, we have also closely scrutinized government displays of religious symbols. And for reasons discussed in the text, the Texas monument cannot survive even a relaxed level of scrutiny.

religion, or with rejection of religion. See *County of Allegheny*, 492 U. S., at 626 (O'CONNOR, J., concurring in part and concurring in judgment) ("I agree that the crèche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community . . . . The display of religious symbols in public areas of core government buildings runs a special risk of making religion relevant, in reality or public perception, to status in the political community" (alteration and internal quotation marks omitted)).

Finally, though this too is a point on which judgment will vary, I do not see a persuasive argument for constitutionality in the plurality's observation that Van Orden's lawsuit comes "[f]orty years after the monument's erection . . . ," *ante*, at 682, an observation that echoes the State's contention that one fact cutting in its favor is that "the monument had stood in Austin . . . for some forty years without generating any controversy or litigation," Brief for Respondents 25. It is not that I think the passage of time is necessarily irrelevant in Establishment Clause analysis. We have approved framing-era practices because they must originally have been understood as constitutionally permissible, *e. g.*, *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (legislative prayer), and we have recognized that Sunday laws have grown recognizably secular over time, *McGowan* v. *Maryland*, 366 U. S. 420 (1961). There is also an analogous argument, not yet evaluated, that ritualistic religious expression can become so numbing over time that its initial Establishment Clause violation becomes at some point too diminished for notice. But I do not understand any of these to be the State's argument, which rather seems to be that 40 years without a challenge shows that as a factual matter the religious expression is too tepid to provoke a serious reaction and constitute a violation. Perhaps, but the writer of Exodus chapter 20 was not lukewarm, and other explanations may do better in accounting

for the late resort to the courts. Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.

I would reverse the judgment of the Court of Appeals.

Syllabus

TOWN OF CASTLE ROCK, COLORADO *v.* GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, GONZALES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–278. Argued March 21, 2005—Decided June 27, 2005

Respondent filed this suit under 42 U. S. C. § 1983 alleging that petitioner violated the Fourteenth Amendment's Due Process Clause when its police officers, acting pursuant to official policy or custom, failed to respond to her repeated reports over several hours that her estranged husband had taken their three children in violation of her restraining order against him. Ultimately, the husband murdered the children. The District Court granted the town's motion to dismiss, but an en banc majority of the Tenth Circuit reversed, finding that respondent had alleged a cognizable procedural due process claim because a Colorado statute established the state legislature's clear intent to require police to enforce restraining orders, and thus its intent that the order's recipient have an entitlement to its enforcement. The court therefore ruled, among other things, that respondent had a protected property interest in the enforcement of her restraining order.

Held: Respondent did not, for Due Process Clause purposes, have a property interest in police enforcement of the restraining order against her husband. Pp. 755–768.

(a) The Due Process Clause's procedural component does not protect everything that might be described as a government "benefit": "To have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it." *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577. Such entitlements are created by existing rules or understandings stemming from an independent source such as state law. *E. g., ibid.* Pp. 755–756.

(b) A benefit is not a protected entitlement if officials have discretion to grant or deny it. See, *e. g., Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 462–463. It is inappropriate here to defer to the Tenth Circuit's determination that Colorado law gave respondent a right to police enforcement of the restraining order. This Court therefore proceeds to its own analysis. Pp. 756–758.

(c) Colorado law has not created a personal entitlement to enforcement of restraining orders. It does not appear that state law truly made such enforcement *mandatory*. A well-established tradition of po-

lice discretion has long coexisted with apparently mandatory arrest statutes. Cf. *Chicago* v. *Morales*, 527 U. S. 41, 47, n. 2, 62, n. 32. Against that backdrop, a true mandate of police action would require some stronger indication than the Colorado statute's direction to "use every reasonable means to enforce a restraining order" or even to "arrest . . . or . . . seek a warrant." A Colorado officer would likely have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the violation's circumstances or competing duties counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this, where the suspected violator is not actually present and his whereabouts are unknown. In such circumstances, the statute does not appear to require officers to arrest but only to seek a warrant. That, however, would be an entitlement to nothing but procedure, which cannot be the basis for a property interest. Pp. 758–764.

(d) Even if the statute could be said to make enforcement "mandatory," that would not necessarily mean that respondent has an entitlement to enforcement. Her alleged interest stems not from common law or contract, but only from a State's *statutory* scheme. If she was given a statutory entitlement, the Court would expect to see some indication of that in the statute itself. Although the statute spoke of "protected person[s]" such as respondent, it did so in connection with matters other than a right to enforcement. Most importantly, it spoke directly to the protected person's power to "initiate" contempt proceedings if the order was issued in a civil action, which contrasts tellingly with its conferral of a power merely to "request" initiation of criminal contempt proceedings—and even more dramatically with its complete silence about any power to "request" (much less demand) that an arrest be made. Pp. 764–766.

(e) Even were the Court to think otherwise about Colorado's creation of an entitlement, it is not clear that an individual entitlement to enforcement of a restraining order could constitute a "property" interest for due process purposes. Such a right would have no ascertainable monetary value and would arise incidentally, not out of some new species of government benefit or service, but out of a function that government actors have always performed—arresting people when they have probable cause. A benefit's indirect nature was fatal to a due process claim in *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773, 787. Here, as there, "[t]he simple distinction between government action that directly affects a citizen's legal rights . . . and action that is directed against a third party and affects the citizen only . . . incidentally, pro-

vides a sufficient answer to" cases finding government-provided services to be entitlements. *Id.*, at 788. Pp. 766–768.

366 F. 3d 1093, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 769. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 773.

John C. Eastman argued the cause for petitioner. With him on the briefs were *Thomas S. Rice*, *Eric M. Ziporin*, and *Erik S. Jaffe*.

John P. Elwood argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Keisler*, *Michael Jay Singer*, and *Howard S. Scher*.

Brian J. Reichel argued the cause and filed a brief for respondent.*

JUSTICE SCALIA delivered the opinion of the Court.

We decide in this case whether an individual who has obtained a state-law restraining order has a constitutionally

---

*Briefs of *amici curiae* urging reversal were filed for the Denver Police Protective Association et al. by *David J. Bruno* and *Michael T. Lowe;* and for the International Municipal Lawyers Association et al. by *Brad D. Bailey* and *Kathryn L. Schroeder*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Stuart R. Cohen*, *Susan Ann Silverstein*, and *Michael Schuster;* for the American Civil Liberties Union et al. by *Caroline M. Brown*, *Steven R. Shapiro*, and *Lenora M. Lapidus;* for International Law Scholars et al. by *Jennifer K. Brown* and *Rhonda Copelon;* for the National Association of Women Lawyers et al. by *Lorelie S. Masters;* for the National Black Police Association et al. by *Richard W. Smith* and *Joan S. Meier;* for the National Coalition Against Domestic Violence et al. by *Naomi G. Beer*, *Libby Y. Mote*, and *Michele E. Stone;* for the National Network to End Domestic Violence et al. by *Fernando R. Laguarda;* and for Peggy Kerns et al. by *David G. Hall* and *James C. Harrington*.

Deanne M. Ottaviano and *Janine A. Carlan* filed a brief for the Family Violence Prevention Fund et al. as *amici curiae*.

protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.

I

The horrible facts of this case are contained in the complaint that respondent Jessica Gonzales filed in Federal District Court. (Because the case comes to us on appeal from a dismissal of the complaint, we assume its allegations are true. See *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002).) Respondent alleges that petitioner, the town of Castle Rock, Colorado, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution when its police officers, acting pursuant to official policy or custom, failed to respond properly to her repeated reports that her estranged husband was violating the terms of a restraining order.[1]

The restraining order had been issued by a state trial court several weeks earlier in conjunction with respondent's divorce proceedings. The original form order, issued on May 21, 1999, and served on respondent's husband on June 4, 1999, commanded him not to "molest or disturb the peace of [respondent] or of any child," and to remain at least 100 yards from the family home at all times. 366 F. 3d 1093, 1143 (CA10 2004) (en banc) (appendix to dissenting opinion of O'Brien, J.). The bottom of the preprinted form noted that the reverse side contained "IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS." *Ibid.* (emphasis deleted). The pre-

[1] Petitioner claims that respondent's complaint "did not allege . . . that she ever notified the police of her contention that [her husband] was actually in violation of the restraining order." Brief for Petitioner 7, n. 2. The complaint does allege, however, that respondent "showed [the police] a copy of the [temporary restraining order (TRO)] and requested that it be enforced." App. to Pet. for Cert. 126a. At this stage in the litigation, we may assume that this reasonably implied the order was being violated. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 104 (1998).

printed text on the back of the form included the following "**WARNING**":

> "**A KNOWING VIOLATION OF A RESTRAINING ORDER IS A CRIME** . . . . A VIOLATION WILL ALSO CONSTITUTE CONTEMPT OF COURT. **YOU MAY BE ARRESTED** WITHOUT NOTICE IF A LAW ENFORCEMENT OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT YOU HAVE KNOWINGLY VIOLATED THIS ORDER." *Id.*, at 1144 (emphasis in original).

The preprinted text on the back of the form also included a "**NOTICE TO LAW ENFORCEMENT OFFICIALS,**" which read in part:

> "YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER." *Ibid.* (same).

On June 4, 1999, the state trial court modified the terms of the restraining order and made it permanent. The modified order gave respondent's husband the right to spend time with his three daughters (ages 10, 9, and 7) on alternate weekends, for two weeks during the summer, and, "'upon reasonable notice,'" for a midweek dinner visit "'arranged by the parties'"; the modified order also allowed him to visit

the home to collect the children for such "parenting time." *Id.*, at 1097 (majority opinion).

According to the complaint, at about 5 or 5:30 p.m. on Tuesday, June 22, 1999, respondent's husband took the three daughters while they were playing outside the family home. No advance arrangements had been made for him to see the daughters that evening. When respondent noticed the children were missing, she suspected her husband had taken them. At about 7:30 p.m., she called the Castle Rock Police Department, which dispatched two officers. The complaint continues: "When [the officers] arrived . . . , she showed them a copy of the TRO and requested that it be enforced and the three children be returned to her immediately. [The officers] stated that there was nothing they could do about the TRO and suggested that [respondent] call the Police Department again if the three children did not return home by 10:00 p.m." App. to Pet. for Cert. 126a.[2]

At approximately 8:30 p.m., respondent talked to her husband on his cellular telephone. He told her "he had the three children [at an] amusement park in Denver." *Ibid.* She called the police again and asked them to "have someone check for" her husband or his vehicle at the amusement park and "put out an [all points bulletin]" for her husband, but the officer with whom she spoke "refused to do so," again telling her to "wait until 10:00 p.m. and see if" her husband returned the girls. *Id.*, at 126a–127a.

At approximately 10:10 p.m., respondent called the police and said her children were still missing, but she was now told to wait until midnight. She called at midnight and told the dispatcher her children were still missing. She went to her husband's apartment and, finding nobody there, called the police at 12:10 a.m.; she was told to wait for an officer to arrive. When none came, she went to the police station at

[2] It is unclear from the complaint, but immaterial to our decision, whether respondent showed the police only the original "TRO" or also the permanent, modified restraining order that had superseded it on June 4.

12:50 a.m. and submitted an incident report. The officer who took the report "made no reasonable effort to enforce the TRO or locate the three children. Instead, he went to dinner." *Id.*, at 127a.

At approximately 3:20 a.m., respondent's husband arrived at the police station and opened fire with a semiautomatic handgun he had purchased earlier that evening. Police shot back, killing him. Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered. *Ibid.*

On the basis of the foregoing factual allegations, respondent brought an action under Rev. Stat. § 1979, 42 U. S. C. § 1983, claiming that the town violated the Due Process Clause because its police department had "an official policy or custom of failing to respond properly to complaints of restraining order violations" and "tolerate[d] the nonenforcement of restraining orders by its police officers." App. to Pet. for Cert. 129a.[3] The complaint also alleged that the town's actions "were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to" respondent's civil rights. *Ibid.*

Before answering the complaint, the defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The District Court granted the motion, concluding that, whether construed as making a substantive due process or procedural due process claim, respondent's complaint failed to state a claim upon which relief could be granted.

A panel of the Court of Appeals affirmed the rejection of a substantive due process claim, but found that respondent had alleged a cognizable procedural due process claim. 307 F. 3d 1258 (CA10 2002). On rehearing en banc, a divided

---

[3] Three police officers were also named as defendants in the complaint, but the Court of Appeals concluded that they were entitled to qualified immunity, 366 F. 3d 1093, 1118 (CA10 2004) (en banc). Respondent did not file a cross-petition challenging that aspect of the judgment.

court reached the same disposition, concluding that respondent had a "protected property interest in the enforcement of the terms of her restraining order" and that the town had deprived her of due process because "the police never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order." 366 F. 3d, at 1101, 1117. We granted certiorari. 543 U. S. 955 (2004).

II

The Fourteenth Amendment to the United States Constitution provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." Amdt. 14, § 1. In 42 U. S. C. § 1983, Congress has created a federal cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Respondent claims the benefit of this provision on the ground that she had a property interest in police enforcement of the restraining order against her husband; and that the town deprived her of this property without due process by having a policy that tolerated nonenforcement of restraining orders.

As the Court of Appeals recognized, we left a similar question unanswered in *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189 (1989), another case with "undeniably tragic" facts: Local child-protection officials had failed to protect a young boy from beatings by his father that left him severely brain damaged. *Id.*, at 191–193. We held that the so-called "substantive" component of the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.*, at 195. We noted, however, that the petitioner had not properly preserved the argument that—and we thus "decline[d] to consider" whether—state "child protection statutes gave [him] an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection." *Id.*, at 195, n. 2.

The procedural component of the Due Process Clause does not protect everything that might be described as a "benefit": "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972). Such entitlements are, "'of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Paul* v. *Davis*, 424 U. S. 693, 709 (1976) (quoting *Roth*, *supra*, at 577); see also *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998).

A

Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. See, *e. g.*, *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 462–463 (1989). The Court of Appeals in this case determined that Colorado law created an entitlement to enforcement of the restraining order because the "court-issued restraining order . . . specifically dictated that its terms must be enforced" and a "state statute command[ed]" enforcement of the order when certain objective conditions were met (probable cause to believe that the order had been violated and that the object of the order had received notice of its existence). 366 F. 3d, at 1101, n. 5; see also *id.*, at 1100, n. 4; *id.*, at 1104–1105, and n. 9. Respondent contends that we are obliged "to give deference to the Tenth Circuit's analysis of Colorado law on" whether she had an entitlement to enforcement of the restraining order. Tr. of Oral Arg. 52.

We will not, of course, defer to the Tenth Circuit on the ultimate issue: whether what Colorado law has given respondent constitutes a property interest for purposes of the Fourteenth Amendment. That determination, despite its

state-law underpinnings, is ultimately one of federal constitutional law. "Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 9 (1978) (quoting *Roth*, *supra*, at 577; emphasis added); cf. *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 279 (1943). Resolution of the federal issue begins, however, with a determination of what it is that state law provides. In the context of the present case, the central state-law question is whether Colorado law gave respondent a right to police enforcement of the restraining order. It is on this point that respondent's call for deference to the Tenth Circuit is relevant.

We have said that a "presumption of deference [is] given the views of a federal court as to the law of a State within its jurisdiction." *Phillips*, *supra*, at 167. That presumption can be overcome, however, see *Leavitt* v. *Jane L.*, 518 U. S. 137, 145 (1996) *(per curiam)*, and we think deference inappropriate here. The Tenth Circuit's opinion, which reversed the Colorado District Judge, did not draw upon a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and a state-legislative-hearing transcript. See 366 F. 3d, at 1103–1109. These texts, moreover, say nothing distinctive to Colorado, but use mandatory language that (as we shall discuss) appears in many state and federal statutes. As for case law: The only state-law cases about restraining orders that the Court of Appeals relied upon were decisions of Federal District Courts in Ohio and Pennsylvania and state courts in New Jersey, Oregon, and Tennessee. *Id.*, at 1104–1105, n. 9, 1109.[4] Moreover, if we were simply to ac-

[4] Most of the Colorado-law cases cited by the Court of Appeals appeared in footnotes declaring them to be irrelevant because they involved only substantive due process (366 F. 3d, at 1100–1101, nn. 4–5), only statutes

cept the Court of Appeals' conclusion, we would necessarily have to decide conclusively a federal constitutional question (*i. e.*, whether such an entitlement constituted property under the Due Process Clause and, if so, whether petitioner's customs or policies provided too little process to protect it). We proceed, then, to our own analysis of whether Colorado law gave respondent a right to enforcement of the restraining order.[5]

B

The critical language in the restraining order came not from any part of the order itself (which was signed by the state-court trial judge and directed to the restrained party, respondent's husband), but from the preprinted notice to law-enforcement personnel that appeared on the back of the order. See *supra*, at 751–752. That notice effectively restated the statutory provision describing "peace officers' duties" related to the crime of violation of a restraining order. At the time of the conduct at issue in this case, that provision read as follows:

> "(a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such

---

without restraining orders (*id.*, at 1101, n. 5), or Colorado's Government Immunity Act, which the Court of Appeals concluded applies "only to . . . state tort law claims" (*id.*, at 1108–1109, n. 12). Our analysis is likewise unaffected by the Immunity Act or by the way that Colorado has dealt with substantive due process or cases that do not involve restraining orders.

[5] In something of an anyone-but-us approach, the dissent simultaneously (and thus unpersuasively) contends not only that this Court should certify a question to the Colorado Supreme Court, *post*, at 776–778 (opinion of STEVENS, J.), but also that it should defer to the Tenth Circuit (which itself did not certify any such question), *post*, at 775–776. No party in this case has requested certification, even as an alternative disposition. See Tr. of Oral Arg. 56 (petitioner's counsel "disfavor[ing]" certification); *id.*, at 25–26 (counsel for the United States arguing against certification). At oral argument, in fact, respondent's counsel declined JUSTICE STEVENS' invitation to request it. *Id.*, at 53.

order. *A peace officer shall use every reasonable means to enforce a restraining order.*

"(b) *A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person* when the peace officer has information amounting to probable cause that:

"(I) The restrained person has violated or attempted to violate any provision of a restraining order; and

"(II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

"(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. *A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry.*" Colo. Rev. Stat. § 18–6–803.5(3) (Lexis 1999) (emphases added).

The Court of Appeals concluded that this statutory provision—especially taken in conjunction with a statement from its legislative history,[6] and with another statute restricting

---

[6] The Court of Appeals quoted one lawmaker's description of how the bill "'would really attack the domestic violence problems'":

"'[T]he entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.

"'[T]he entire system must send the same message . . . [that] violence is criminal. And so we hope that House Bill 1253 starts us down this road.'" 366 F. 3d, at 1107 (quoting Tr. of Colorado House Judiciary Hearings on House Bill 1253, Feb. 15, 1994; emphasis deleted).

criminal and civil liability for officers making arrests[7]—established the Colorado Legislature's clear intent "to alter the fact that the police were not enforcing domestic abuse restraining orders," and thus its intent "that the recipient of a domestic abuse restraining order have an entitlement to its enforcement." 366 F. 3d, at 1108. Any other result, it said, "would render domestic abuse restraining orders utterly valueless." *Id.*, at 1109.

This last statement is sheer hyperbole. Whether or not respondent had a right to enforce the restraining order, it rendered certain otherwise lawful conduct by her husband both criminal and in contempt of court. See §§18–6–803.5(2)(a), (7). The creation of grounds on which he could be arrested, criminally prosecuted, and held in contempt was hardly "valueless"—even if the prospect of those sanctions ultimately failed to prevent him from committing three murders and a suicide.

We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.

> "In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police. . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. . . . [T]hey clearly do not mean that a police officer may not lawfully decline to . . . make an arrest. As to third parties in these states, the full-enforcement statutes simply have no effect, and their significance is

[7] Under Colo. Rev. Stat. §18–6–803.5(5) (Lexis 1999), "[a] peace officer arresting a person for violating a restraining order or otherwise enforcing a restraining order" was not to be held civilly or criminally liable unless he acted "in bad faith and with malice" or violated "rules adopted by the Colorado supreme court."

> further diminished." 1 ABA Standards for Criminal Justice 1–4.5, commentary, pp. 1–124 to 1–125 (2d ed. 1980) (footnotes omitted).

The deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands, is illustrated by *Chicago* v. *Morales*, 527 U. S. 41 (1999), which involved an ordinance that said a police officer "'shall order'" persons to disperse in certain circumstances, *id.*, at 47, n. 2. This Court rejected out of hand the possibility that "the mandatory language of the ordinance . . . afford[ed] the police *no* discretion." *Id.*, at 62, n. 32. It is, the Court proclaimed, simply "common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances." *Ibid.* (emphasis added).

Against that backdrop, a true mandate of police action would require some stronger indication from the Colorado Legislature than "shall use every reasonable means to enforce a restraining order" (or even "shall arrest . . . or . . . seek a warrant"), §§ 18–6–803.5(3)(a), (b). That language is not perceptibly more mandatory than the Colorado statute which has long told municipal chiefs of police that they "shall pursue and arrest any person fleeing from justice in any part of the state" and that they "shall apprehend any person in the act of committing any offense . . . and, forthwith and without any warrant, bring such person before a . . . competent authority for examination and trial." Colo. Rev. Stat. § 31–4–112 (Lexis 2004). It is hard to imagine that a Colorado peace officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance.[8]

[8] Respondent in fact concedes that an officer may "properly" decide not to enforce a restraining order when the officer deems "a technical violation" too "immaterial" to justify arrest. Respondent explains this as a determination that there is no probable cause. Brief for Respond-

The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown. Cf. *Donaldson* v. *Seattle*, 65 Wash. App. 661, 671–672, 831 P. 2d 1098, 1104 (1992) ("There is a vast difference between a mandatory duty to arrest [a violator who is on the scene] and a mandatory duty to conduct a follow up investigation [to locate an absent violator]. . . . A mandatory duty to investigate . . . would be completely open-ended as to priority, duration and intensity").

The dissent correctly points out that, in the specific context of domestic violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest statutes. *Post*, at 779–784 (opinion of STEVENS, J.). The Colorado statute mandating arrest for a domestic-violence offense is different from but related to the one at issue here, and it includes similar though not identical phrasing. See Colo. Rev. Stat. § 18–6–803.6(1) (Lexis 1999) ("When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence . . . has been committed, the officer shall, without undue delay, arrest the person suspected of its commission . . . "). Even in the domestic-violence context, however, it is unclear how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested. As the dissent explains, *post*, at 780–781, and n. 8, much of the impetus for mandatory-arrest statutes and policies derived from the idea that it is better for police officers to arrest the aggressor in a domestic-violence incident than to attempt to mediate the dispute or merely to ask the offender to leave the scene. Those other options are only available, of course, when the offender is present at the

---

ent 28. We think, however, that a determination of no probable cause to believe a violation has occurred is quite different from a determination that the violation is too insignificant to pursue.

scene. See Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849, 1860 (1996) ("[T]he clear trend in police practice is to arrest the batterer *at the scene* . . . " (emphasis added)).

As one of the cases cited by the dissent, *post*, at 783, recognized, "there will be situations when no arrest is possible, *such as when the alleged abuser is not in the home.*" *Donaldson*, 65 Wash. App., at 674, 831 P. 2d, at 1105 (emphasis added). That case held that Washington's mandatory-arrest statute required an arrest only in "cases where the offender is on the scene," and that it "d[id] not create an on-going mandatory duty to conduct an investigation" to locate the offender. *Id.*, at 675, 831 P. 2d, at 1105. Colorado's restraining-order statute appears to contemplate a similar distinction, providing that when arrest is "impractical"—which was likely the case when the whereabouts of respondent's husband were unknown—the officers' statutory duty is to "seek a warrant" rather than "arrest." § 18–6–803.5(3)(b).

Respondent does not specify the precise means of enforcement that the Colorado restraining-order statute assertedly mandated—whether her interest lay in having police arrest her husband, having them seek a warrant for his arrest, or having them "use every reasonable means, up to and including arrest, to enforce the order's terms," Brief for Respondent 29–30.[9] Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed "entitled" to something when the identity of the alleged entitlement is vague. See *Roth*, 408 U. S., at 577 (considering

---

[9] Respondent characterizes her entitlement in various ways. See Brief for Respondent 12 ("'entitlement' to receive protective services"); *id.*, at 13 ("interest in police enforcement action"); *id.*, at 14 ("specific government benefit" consisting of "the government service of enforcing the objective terms of the court order protecting her and her children against her abusive husband"); *id.*, at 32 ("[T]he restraining order here mandated the arrest of Mr. Gonzales under specified circumstances, or at a minimum required the use of reasonable means to enforce the order").

whether "certain benefits" were "secure[d]" by rule or understandings); cf. *Natale* v. *Ridgefield*, 170 F. 3d 258, 263 (CA2 1999) ("There is no reason . . . to restrict the 'uncertainty' that will preclude existence of a federally protectable property interest to the uncertainty that inheres in [the] exercise of discretion"). The dissent, after suggesting various formulations of the entitlement in question,[10] ultimately contends that the obligations under the statute were quite precise: either make an arrest or (if that is impractical) seek an arrest warrant, *post*, at 785. The problem with this is that the seeking of an arrest warrant would be an entitlement to nothing but procedure—which we have held inadequate even to support standing, see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992); much less can it be the basis for a property interest. See *post*, at 771–772 (SOUTER, J., concurring). After the warrant is sought, it remains within the discretion of a judge whether to grant it, and after it is granted, it remains within the discretion of the police whether and when to execute it.[11] Respondent would have been assured nothing but the seeking of a warrant. This is not the sort of "entitlement" out of which a property interest is created.

Even if the statute could be said to have made enforcement of restraining orders "mandatory" because of the domestic-violence context of the underlying statute, that would not

---

[10] See *post*, at 773 ("entitlement to police protection"); *ibid.* ("entitlement to mandatory individual protection by the local police force"); *post*, at 774 ("a right to police assistance"); *post*, at 779 ("a citizen's interest in the government's commitment to provide police enforcement in certain defined circumstances"); *post*, at 789 ("respondent's property interest in the enforcement of her restraining order"); *post*, at 790, 791 (the "service" of "protection from her husband"); *post*, at 792 ("interest in the enforcement of the restraining order").

[11] The dissent asserts that the police would lack discretion in the execution of this warrant, *post*, at 785, n. 12, but cites no statute mandating immediate execution. The general Colorado statute governing arrest provides that police "may arrest" when they possess a warrant "commanding" arrest. Colo. Rev. Stat. § 16–3–102(1) (Lexis 1999).

necessarily mean that state law gave *respondent* an entitlement to *enforcement* of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people. See, *e. g.*, *Sandin* v. *Conner*, 515 U. S. 472, 482 (1995) (finding no constitutionally protected liberty interest in prison regulations phrased in mandatory terms, in part because "[s]uch guidelines are not set forth solely to benefit the prisoner"). The serving of public rather than private ends is the normal course of the criminal law because criminal acts, "besides the injury [they do] to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity." 4 W. Blackstone, Commentaries on the Laws of England 5 (1769); see also *Huntington* v. *Attrill*, 146 U. S. 657, 668 (1892). This principle underlies, for example, a Colorado district attorney's discretion to prosecute a domestic assault, even though the victim withdraws her charge. See *People* v. *Cunefare*, 102 P. 3d 302, 311–312 (Colo. 2004) (en banc) (Bender, J., concurring in part, dissenting in part, and dissenting in part to the judgment).

Respondent's alleged interest stems only from a State's *statutory* scheme—from a restraining order that was authorized by and tracked precisely the statute on which the Court of Appeals relied. She does not assert that she has any common-law or contractual entitlement to enforcement. If she was given a statutory entitlement, we would expect to see some indication of that in the statute itself. Although Colorado's statute spoke of "protected person[s]" such as respondent, it did so in connection with matters other than a right to enforcement. It said that a "protected person shall be provided with a copy of [a restraining] order" when it is issued, § 18–6–803.5(3)(a); that a law enforcement agency "shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person," § 18–6–803.5(3)(d); and that the agency "shall give [to the protected

person] a copy" of the report it submits to the court that issued the order, § 18–6–803.5(3)(e). Perhaps most importantly, the statute spoke directly to the protected person's power to "initiate contempt proceedings against the restrained person if the order [was] issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order [was] issued in a criminal action." § 18–6–803.5(7). The protected person's express power to "initiate" civil contempt proceedings contrasts tellingly with the mere ability to "request" initiation of criminal contempt proceedings—and even more dramatically with the complete silence about any power to "request" (much less demand) that an arrest be made.

The creation of a personal entitlement to something as vague and novel as enforcement of restraining orders cannot "simply g[o] without saying." *Post*, at 788, n. 16 (STEVENS, J., dissenting). We conclude that Colorado has not created such an entitlement.

C

Even if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a "property" interest for purposes of the Due Process Clause. Such a right would not, of course, resemble any traditional conception of property. Although that alone does not disqualify it from due process protection, as *Roth* and its progeny show, the right to have a restraining order enforced does not "have some ascertainable monetary value," as even our "*Roth*-type property-as-entitlement" cases have implicitly required. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 964 (2000).[12] Perhaps most radically, the alleged property

[12] The dissent suggests that the interest in having a restraining order enforced does have an ascertainable monetary value, because one may "contract with a private security firm . . . to provide protection" for one's family. *Post*, at 773, 790, 791, and n. 19. That is, of course, not as precise

interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed—to wit, arresting people who they have probable cause to believe have committed a criminal offense.[13]

The indirect nature of a benefit was fatal to the due process claim of the nursing-home residents in *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773 (1980). We held that, while the withdrawal of "direct benefits" (financial payments under Medicaid for certain medical services) triggered due process protections, *id.*, at 786–787, the same was not true for the "indirect benefit[s]" conferred on Medicaid patients when the Government enforced "minimum standards of care" for nursing-home facilities, *id.*, at 787. "[A]n indirect and incidental result of the Government's enforcement action . . . does not amount to a deprivation of any interest in life, liberty, or property." *Ibid.* In this case, as in *O'Bannon*, "[t]he simple distinction between government action that directly affects a citizen's legal rights . . . and action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to" respondent's reliance on cases that found government-provided

---

as the analogy between public and private schooling that the dissent invokes. *Post*, at 791, n. 19. Respondent probably could have hired a private firm to guard her house, to prevent her husband from coming onto the property, and perhaps even to search for her husband after she discovered that her children were missing. Her alleged entitlement here, however, does not consist in an abstract right to "protection," but (according to the dissent) in enforcement of her restraining order through the arrest of her husband, or the seeking of a warrant for his arrest, after she gave the police probable cause to believe the restraining order had been violated. A private person would not have the power to arrest under those circumstances because the crime would not have occurred in his presence. Colo. Rev. Stat. § 16–3–201 (Lexis 1999). And, needless to say, a private person would not have the power to obtain an arrest warrant.

[13] In other contexts, we have explained that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973).

services to be entitlements. *Id.*, at 788. The *O'Bannon* Court expressly noted, *ibid.*, that the distinction between direct and indirect benefits distinguished *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1 (1978), one of the government-services cases on which the dissent relies, *post*, at 789.

III

We conclude, therefore, that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband. It is accordingly unnecessary to address the Court of Appeals' determination (366 F. 3d, at 1110–1117) that the town's custom or policy prevented the police from giving her due process when they deprived her of that alleged interest. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 61 (1999).[14]

In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as "'a font of tort law,'" *Parratt* v. *Taylor*, 451 U. S. 527, 544 (1981) (quoting *Paul* v. *Davis*, 424 U. S., at 701), but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have

---

[14] Because we simply do not address whether the process would have been adequate if respondent had had a property interest, the dissent is correct to note that we do not "contest" the point, *post*, at 774. Of course we do not *accept* it either.

prevented, the people of Colorado are free to craft such a system under state law. Cf. *DeShaney*, 489 U. S., at 203.[15]

The judgment of the Court of Appeals is

Reversed.

JUSTICE SOUTER, with whom JUSTICE BREYER joins, concurring.

I agree with the Court that Jessica Gonzales has shown no violation of an interest protected by the Fourteenth Amendment's Due Process Clause, and I join the Court's opinion. The Court emphasizes the traditional public focus of law enforcement as reason to doubt that these particular legal requirements to provide police services, however unconditional their form, presuppose enforceable individual rights to a certain level of police protection. *Ante*, at 764–765. The

---

[15] In Colorado, the general statutory immunity for government employees does not apply when "the act or omission causing . . . injury was willful and wanton." Colo. Rev. Stat. §24–10–118(2)(a) (Lexis 1999). Respondent's complaint does allege that the police officers' actions "were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to" her civil rights. App. to Pet. for Cert. 128a.

The state cases cited by the dissent that afford a cause of action for police failure to enforce restraining orders, *post*, at 782–784, 786, n. 13, vindicate state common-law or statutory tort claims—not procedural due process claims under the Federal Constitution. See *Donaldson* v. *Seattle*, 65 Wash. App. 661, 831 P. 2d 1098 (1992) (city could be liable under some circumstances for *per se* negligence in failing to meet statutory duty to arrest); *Matthews* v. *Pickett County*, 996 S. W. 2d 162 (Tenn. 1999) (county could be liable under Tennessee's Governmental Tort Liability Act where restraining order created a special duty); *Campbell* v. *Campbell*, 294 N. J. Super. 18, 682 A. 2d 272 (1996) (rejecting four specific defenses under the New Jersey Tort Claims Act in negligence action against individual officers); *Sorichetti* v. *New York*, 65 N. Y. 2d 461, 482 N. E. 2d 70 (1985) (city breached duty of care arising from special relationship between police and victim); *Nearing* v. *Weaver*, 295 Ore. 702, 670 P. 2d 137 (1983) (en banc) (statutory duty to individual plaintiffs arising independently of tort-law duty of care).

Court also notes that the terms of the Colorado statute involved here recognize and preserve the traditional discretion afforded law enforcement officers. *Ante*, at 760–764, and n. 8. Gonzales's claim of a property right thus runs up against police discretion in the face of an individual demand to enforce, and discretion to ignore an individual instruction not to enforce (because, say, of a domestic reconciliation); no one would argue that the beneficiary of a Colorado order like the one here would be authorized to control a court's contempt power or order the police to refrain from arresting. These considerations argue against inferring any guarantee of a level of protection or safety that could be understood as the object of a "legitimate claim of entitlement," *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972), in the nature of property arising under Colorado law.* Consequently, the classic predicate for federal due process protection of interests under state law is missing.

Gonzales implicitly recognizes this, when she makes the following argument:

> "Ms. Gonzales alleges that . . . she was denied the process laid out in the statute. The police did not consider her request in a timely fashion, but instead repeatedly required her to call the station over several hours. The statute promised a process by which her restraining order would be given vitality through careful and prompt consideration of an enforcement request . . . . Denial of that process drained all of the value from her property interest in the restraining order." Brief for Respondent 10.

The argument is unconventional because the state-law benefit for which it claims federal procedural protection is itself a variety of procedural regulation, a set of rules to be followed by officers exercising the State's executive power: use

*Gonzales does not claim to have a protected liberty interest.

all reasonable means to enforce, arrest upon demonstrable probable cause, get a warrant, and so on, see *ante*, at 751–752.

When her argument is understood as unconventional in this sense, a further reason appears for rejecting its call to apply *Roth*, a reason that would apply even if the statutory mandates to the police were absolute, leaving the police with no discretion when the beneficiary of a protective order insists upon its enforcement. The Due Process Clause extends procedural protection to guard against unfair deprivation by state officials of substantive state-law property rights or entitlements; the federal process protects the property created by state law. But Gonzales claims a property interest in a state-mandated process in and of itself. This argument is at odds with the rule that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U. S. 238, 250 (1983); see also *Doe* v. *District of Columbia*, 93 F. 3d 861, 868 (CADC 1996) *(per curiam)*; *Doe* v. *Milwaukee County*, 903 F. 2d 499, 502–503 (CA7 1990). In putting to rest the notion that the scope of an otherwise discernible property interest could be limited by related state-law procedures, this Court observed that "[t]he categories of substance and procedure are distinct. . . . 'Property' cannot be defined by the procedures provided for its deprivation." *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 541 (1985). Just as a State cannot diminish a property right, once conferred, by attaching less than generous procedure to its deprivation, *ibid.*, neither does a State create a property right merely by ordaining beneficial procedure unconnected to some articulable substantive guarantee. This is not to say that state rules of executive procedure may not provide significant reasons to infer an articulable property right meant to be protected; but it is to say that we have not identified property

with procedure as such. State rules of executive procedure, however important, may be nothing more than rules of executive procedure.

Thus, in every instance of property recognized by this Court as calling for federal procedural protection, the property has been distinguishable from the procedural obligations imposed on state officials to protect it. Whether welfare benefits, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), attendance at public schools, *Goss* v. *Lopez*, 419 U. S. 565 (1975), utility services, *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1 (1978), public employment, *Perry* v. *Sindermann*, 408 U. S. 593 (1972), professional licenses, *Barry* v. *Barchi*, 443 U. S. 55 (1979), and so on, the property interest recognized in our cases has always existed apart from state procedural protection before the Court has recognized a constitutional claim to protection by federal process. To accede to Gonzales's argument would therefore work a sea change in the scope of federal due process, for she seeks federal process as a substitute simply for state process. (And she seeks damages under Rev. Stat. § 1979, 42 U. S. C. § 1983, for denial of process to which she claimed a federal right.) There is no articulable distinction between the object of Gonzales's asserted entitlement and the process she desires in order to protect her entitlement; both amount to certain steps to be taken by the police to protect her family and herself. Gonzales's claim would thus take us beyond *Roth* or any other recognized theory of Fourteenth Amendment due process, by collapsing the distinction between property protected and the process that protects it, and would federalize every mandatory state-law direction to executive officers whose performance on the job can be vitally significant to individuals affected.

The procedural directions involved here are just that. They presuppose no enforceable substantive entitlement, and *Roth* does not raise them to federally enforceable status in the name of due process.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The issue presented to us is much narrower than is suggested by the far-ranging arguments of the parties and their *amici*. Neither the tragic facts of the case, nor the importance of according proper deference to law enforcement professionals, should divert our attention from that issue. That issue is whether the restraining order entered by the Colorado trial court on June 4, 1999, created a "property" interest that is protected from arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment.

It is perfectly clear, on the one hand, that neither the Federal Constitution itself, nor any federal statute, granted respondent or her children any individual entitlement to police protection. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189 (1989). Nor, I assume, does any Colorado statute create any such entitlement for the ordinary citizen. On the other hand, it is equally clear that federal law imposes no impediment to the creation of such an entitlement by Colorado law. Respondent certainly could have entered into a contract with a private security firm, obligating the firm to provide protection to respondent's family; respondent's interest in such a contract would unquestionably constitute "property" within the meaning of the Due Process Clause. If a Colorado statute enacted for her benefit, or a valid order entered by a Colorado judge, created the functional equivalent of such a private contract by granting respondent an entitlement to mandatory individual protection by the local police force, that state-created right would also qualify as "property" entitled to constitutional protection.

I do not understand the majority to rule out the foregoing propositions, although it does express doubts. See *ante*, at 766 ("[I]t is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a

'property' interest"). Moreover, the majority does not contest, see *ante*, at 768, that if respondent did have a cognizable property interest in this case, the deprivation of that interest violated due process. As the Court notes, respondent has alleged that she presented the police with a copy of the restraining order issued by the Colorado court and requested that it be enforced. *Ante*, at 751, n. 1. In response, she contends, the officers effectively ignored her. If these allegations are true, a federal statute, Rev. Stat. § 1979, 42 U. S. C. § 1983, provides her with a remedy against the petitioner, even if Colorado law does not. See *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532 (1985).

The central question in this case is therefore whether, as a matter of Colorado law, respondent had a right to police assistance comparable to the right she would have possessed to any other service the government or a private firm might have undertaken to provide. See *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits").

There was a time when our tradition of judicial restraint would have led this Court to defer to the judgment of more qualified tribunals in seeking the correct answer to that difficult question of Colorado law. Unfortunately, although the majority properly identifies the "central state-law question" in this case as "whether Colorado law gave respondent a right to police enforcement of the restraining order," *ante*, at 758, it has chosen to ignore our settled practice by providing its *own* answer to that question. Before identifying the flaws in the Court's ruling on the merits, I shall briefly comment on our past practice.

I

The majority's decision to plunge ahead with its own analysis of Colorado law imprudently departs from this Court's longstanding policy of paying "deference [to] the views of a federal court as to the law of a State within its jurisdiction." *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 167 (1998); see also *Bishop* v. *Wood*, 426 U. S. 341, 346, and n. 10 (1976) (collecting cases). This policy is not only efficient, but it reflects "our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 500–501 (1985); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629–630 (1946) (endorsing "great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice' "). Accordingly, we have declined to show deference only in rare cases in which the court of appeals' resolution of state law was "clearly wrong" or otherwise seriously deficient. See *Brockett*, 472 U. S., at 500, n. 9; accord, *Leavitt* v. *Jane L.*, 518 U. S. 137, 145 (1996) *(per curiam)*.

Unfortunately, the Court does not even attempt to demonstrate that the six-judge en banc majority was "clearly wrong" in its interpretation of Colorado's domestic restraining order statute; nor could such a showing be made. For it is certainly *plausible* to construe "*shall* use every reasonable means to enforce a restraining order" and "*shall* arrest," Colo. Rev. Stat. §§ 18–6–803.5(3)(a)–(b) (Lexis 1999) (emphasis added), as conveying mandatory directives to the police, particularly when the same statute, at other times, tellingly employs different language that suggests police discretion, see § 18–6–803.5(6)(a) ("A peace officer *is authorized to* use every reasonable means to protect . . . "; "Such peace officer *may* transport . . . " (emphasis added)).[1] Moreover, unlike

[1] The Court of Appeals also looked to other provisions of the statute to inform its analysis. In particular, it reasoned that a provision that gave police officers qualified immunity in connection with their enforcement of

today's decision, the Court of Appeals was attentive to the legislative history of the statute, focusing on a statement by the statute's sponsor in the Colorado House, *ante*, at 759, n. 6 (quoting statement), which it took to "emphasiz[e] the importance of the police's mandatory enforcement of domestic restraining orders." 366 F. 3d 1093, 1107 (CA10 2004) (en banc). Far from overlooking the traditional presumption of police discretion, then, the Court of Appeals' diligent analysis of the statute's text, purpose, and history led it to conclude that the Colorado Legislature intended precisely to abrogate that presumption in the specific context of domestic restraining orders. That conclusion is eminently reasonable and, I believe, worthy of our deference.[2]

II

Even if the Court had good reason to doubt the Court of Appeals' determination of state law, it would, in my judgment, be a far wiser course to certify the question to the

---

restraining orders, see Colo. Rev. Stat. § 18–6–803.5(5) (Lexis 1999), supported the inference that the Colorado Legislature intended mandatory enforcement. See 366 F. 3d 1093, 1108 (CA10 2004) (en banc).

[2] The Court declines to show deference for the odd reason that, in its view, the Court of Appeals did not "draw upon a deep well of state-specific expertise," *ante*, at 757, but rather examined the statute's text and legislative history and distinguished arguably relevant Colorado case law. See *ante*, at 757, and n. 4. This rationale makes a mockery of our traditional practice, for it is precisely when there is no state law on point that the presumption that circuits have local expertise plays any useful role. When a circuit's resolution of a novel question of state law is grounded on a concededly complete review of all the pertinent state-law materials, that decision is entitled to deference. Additionally, it should be noted that this is not a case in which the Court of Appeals and the District Court disagreed on the relevant issue of state law; rather, those courts disagreed only over the extent to which a probable-cause determination requires the exercise of discretion. Compare 366 F. 3d, at 1105–1110, with App. to Pet. for Cert. 122a (District Court opinion).

Colorado Supreme Court.[3] Powerful considerations support certification in this case. First, principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters such as law enforcement and might well require the weighing of policy considerations for their correct resolution.[4] See *Elkins* v. *Moreno*, 435 U. S. 647, 662, n. 16 (1978) (*sua sponte* certifying a question of state law because it is "one in which state governments have the highest interest"); cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 77 (1997) ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources, and hel[p] build a cooperative judicial federalism'" (brackets in original)).[5]

---

[3] See Colo. Rule App. Proc. 21.1(a) (Colorado Supreme Court may answer questions of law certified to it by the Supreme Court of the United States or another federal court if those questions "may be determinative of the cause" and "as to which it appears to the certifying court there is no controlling precedent in the decisions of the [Colorado] Supreme Court").

[4] See *Westminster* v. *Dogan Constr. Co.*, 930 P. 2d 585, 590 (Colo. 1997) (en banc) (in interpreting an ambiguous statute, the Colorado Supreme Court will consider legislative history and the "consequences of a particular construction"); *ibid.* ("'Because we also presume that legislation is intended to have just and reasonable effects, we must construe statutes accordingly and apply them so as to ensure such results'"). Additionally, it is possible that the Colorado Supreme Court would have better access to (and greater facility with) relevant pieces of legislative history beyond those that we have before us. That court may also choose to give certain evidence of legislative intent greater weight than would be customary for this Court. See, *e. g.*, Brief for Peggy Kerns et al. as *Amici Curiae* (bill sponsor explaining the Colorado General Assembly's intent in passing the domestic restraining order statute).

[5] Citing similar considerations, the Second Circuit certified questions of state law to the Connecticut Supreme Court when it was faced with a procedural due process claim involving a statute that arguably mandated the removal of children upon probable cause of child abuse. See *Sealed* v. *Sealed*, 332 F. 3d 51 (2003). The Connecticut Supreme Court accepted

Second, by certifying a potentially dispositive state-law issue, the Court would adhere to its wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law. See *Elkins*, 435 U. S., at 661–662 (citing constitutional avoidance as a factor supporting certification). Third, certification would promote both judicial economy and fairness to the parties. After all, the Colorado Supreme Court is the ultimate authority on the meaning of Colorado law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted and respondent will have been deprived of the opportunity to have her claims heard under the authoritative view of Colorado law. The unique facts of this case only serve to emphasize the importance of employing a procedure that will provide the correct answer to the central question of state law. See *Brockett*, 472 U. S., at 510 (O'CONNOR, J., concurring) ("Speculation by a federal court about the meaning of a state statute in the absence of a prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court").[6]

---

certification and held that the provision was discretionary, not mandatory. See *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 865 A. 2d 428 (2005).

[6]The Court is correct that I would take an "anyone-but-us approach," *ante*, at 758, n. 5, to the question of *who* decides the issue of Colorado law in this case. Both options that I favor—deferring to the Circuit's interpretation or, barring that, certifying to the Colorado Supreme Court—recognize the comparative expertise of another tribunal on questions of state law. And both options offer their own efficiencies. By contrast, the Court's somewhat overconfident "only us" approach lacks any cogent justification. The fact that neither party requested certification certainly cannot be a sufficient reason for dismissing that option. As with abstention, the considerations that weigh in favor of certification—federal-state comity, constitutional avoidance, judicial efficiency, the desire to settle correctly a recurring issue of state law—transcend the interests of individual litigants, rendering it imprudent to cast them as gatekeepers to the procedure. See, *e. g.*, *Elkins* v. *Moreno*, 435 U. S. 647, 662 (1978) (certifying state-law issue absent a request from the parties); *Aldrich*

III

Three flaws in the Court's rather superficial analysis of the merits highlight the unwisdom of its decision to answer the state-law question *de novo*. First, the Court places undue weight on the various statutes throughout the country that seemingly mandate police enforcement but are generally understood to preserve police discretion. As a result, the Court gives short shrift to the unique case of "mandatory arrest" statutes in the domestic violence context; States passed a wave of these statutes in the 1980's and 1990's with the unmistakable goal of eliminating police discretion in this area. Second, the Court's formalistic analysis fails to take seriously the fact that the Colorado statute at issue in this case was enacted for the benefit of the narrow class of persons who are beneficiaries of domestic restraining orders, and that the order at issue in this case was specifically intended to provide protection to respondent and her children. Finally, the Court is simply wrong to assert that a citizen's interest in the government's commitment to provide police enforcement in certain defined circumstances does not resemble any "traditional conception of property," *ante*, at 766; in fact, a citizen's property interest in such a commitment is just as concrete and worthy of protection as her interest in any other important service the government or a private firm has undertaken to provide.

In 1994, the Colorado General Assembly passed omnibus legislation targeting domestic violence. The part of the legislation at issue in this case mandates enforcement of a domestic restraining order upon probable cause of a violation, § 18–6–803.5(3), while another part directs that police officers "shall, without undue delay, arrest" a suspect upon "probable cause to believe that a crime or offense of domestic violence

---

v. *Aldrich*, 375 U. S. 249 (1963) *(per curiam)* (same); see also 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4248, p. 176 (2d ed. 1988) ("Ordinarily a court will order certification on its own motion").

has been committed," § 18–6–803.6(1).[7] In adopting this legislation, the Colorado General Assembly joined a nationwide movement of States that took aim at the crisis of police underenforcement in the domestic violence sphere by implementing "mandatory arrest" statutes. The crisis of underenforcement had various causes, not least of which was the perception by police departments and police officers that domestic violence was a private, "family" matter and that arrest was to be used as a last resort. Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy, 2004 Wis. L. Rev. 1657, 1662–1663 (hereinafter Sack); *id.*, at 1663 ("Because these cases were considered noncriminal, police assigned domestic violence calls low priority and often did not respond to them for several hours or ignored them altogether"). In response to these realities, and emboldened by a well-known 1984 experiment by the Minneapolis police department,[8] "many states enacted man-

[7] See Fuller & Stansberry, 1994 Legislature Strengthens Domestic Violence Protective Orders, 23 Colo. Lawyer 2327 (1994) ("The 1994 Colorado legislative session produced several significant domestic abuse bills that strengthened both civil and criminal restraining order laws and procedures for victims of domestic violence"); *id.*, at 2329 ("Although many law enforcement jurisdictions already take a proactive approach to domestic violence, arrest and procedural policies vary greatly from one jurisdiction to another. H. B. 94–1253 mandates the arrest of domestic violence perpetrators and restraining order violaters. H. B. 94–1090 repeals the requirement that protected parties show a copy of their restraining order to enforcing officers. In the past, failure to provide a copy of the restraining order has led to hesitation from police to enforce the order for fear of an illegal arrest. The new statute also shields arresting officers from liability; this is expected to reduce concerns about enforcing the mandatory arrest requirements" (footnotes omitted)).

[8] See Sack 1669 ("The movement to strengthen arrest policies was bolstered in 1984 by the publication of the results of a study on mandatory arrest in domestic violence cases that had been conducted in Minneapolis. In this study, police handled randomly assigned domestic violence offenders by using one of three different responses: arresting the offender, mediating the dispute or requiring the offender to leave the house for eight hours. The study concluded that in comparison with the other two re-

datory arrest statutes under which a police officer must arrest an abuser when the officer has probable cause to believe that a domestic assault has occurred or that a protection order has been violated." Developments in the Law: Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498, 1537 (1993). The purpose of these statutes was precisely to "counter police resistance to arrests in domestic violence cases by removing or restricting police officer discretion; mandatory arrest policies would increase police response and reduce batterer recidivism." Sack 1670.

Thus, when Colorado passed its statute in 1994, it joined the ranks of 15 States that mandated arrest for domestic violence offenses and 19 States that mandated arrest for domestic restraining order violations. See Developments in the Law, 106 Harv. L. Rev., at 1537, n. 68 (noting statutes in 1993); N. Miller, Institute for Law and Justice, A Law Enforcement and Prosecution Perspective 7, and n. 74, 8, and n. 90 (2003), http://www.ilj.org/dv/dvvawa2000.htm (as visited June 24, 2005, and available in Clerk of Court's case file) (listing Colorado among the many States that currently have mandatory arrest statutes).[9]

Given the specific purpose of these statutes, there can be no doubt that the Colorado Legislature used the term "shall" advisedly in its domestic restraining order statute. While

---

sponses, arrest had a significantly greater impact on reducing domestic violence recidivism. The findings from the Minneapolis study were used by the U. S. Attorney General in a report issued in 1984 that recommended, among other things, arrest in domestic violence cases as the standard law enforcement response" (footnotes omitted)); see also Zorza, The Criminal Law of Misdemeanor Domestic Violence, 1970–1990, 83 J. Crim. L. & C. 46, 63–65 (1992) (tracing history of mandatory arrest laws and noting that the first such law was implemented by Oregon in 1977).

[9] See also Brief for International Municipal Lawyers Association et al. as *Amici Curiae* 6 ("Colorado is not alone in mandating the arrest of persons who violate protective orders. Some 19 states require an arrest when a police officer has probable cause to believe that such orders have been violated" (collecting statutes)).

"shall" is probably best read to mean "may" in other Colorado statutes that seemingly mandate enforcement, cf. Colo. Rev. Stat. § 31–4–112 (Lexis 2004) (police "*shall suppress* all riots, disturbances, and breaches of the peace, *shall apprehend* all disorderly persons in the city . . . " (emphasis added)), it is clear that the elimination of police discretion was integral to Colorado and its fellow States' solution to the problem of underenforcement in domestic violence cases.[10] Since the text of Colorado's statute perfectly captures this legislative purpose, it is hard to imagine what the Court has in mind when it insists on "some stronger indication from the Colorado Legislature." *Ante*, at 761.

While Colorado case law does not speak to the question, it is instructive that other state courts interpreting their analogous statutes have not only held that they eliminate the police's traditional discretion to refuse enforcement, but have

---

[10] See Note, Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is It Enough? 1996 U. Ill. L. Rev. 533, 541–542, 544–546 (describing the problems that attend a discretionary arrest regime: "Even when probable cause is present, police officers still frequently try to calm the parties and act as mediators. . . . Three studies found the arrest rate to range between 3% and 10% when the decision to arrest is left to police discretion. Another study found that the police made arrests in only 13% of the cases where the victim had visible injuries. . . . Police officers often employ irrelevant criteria such as the 'reason' for the abuse or the severity of the victim's injuries in making their decision to arrest. . . . Some [officers] may feel strongly that police should not interfere in family arguments or lovers' quarrels. Such attitudes make police much more likely to investigate intent and provocation, and consider them as mitigating factors, in responding to domestic violence calls than in other types of cases" (footnotes omitted)); see also Walsh, The Mandatory Arrest Law: Police Reaction, 16 Pace L. Rev. 97, 98 (1995). Cf. Sack 1671–1672 ("Mandatory arrest policies have significantly increased the number of arrests of batterers for domestic violence crimes. . . . In New York City, from 1993, the time the mandatory arrest policy was instituted, to 1999, felony domestic violence arrests increased 33%, misdemeanor domestic violence arrests rose 114%, and arrests for violation of orders of protection were up 76%").

also recognized that they create rights enforceable against the police under state law. For example, in *Nearing* v. *Weaver*, 295 Ore. 702, 670 P. 2d 137 (1983) (en banc), the court held that although the common law of negligence did not support a suit against the police for failing to enforce a domestic restraining order, the statute's mandatory directive formed the basis for the suit because it was "a specific duty imposed by statute for the benefit of individuals previously identified by judicial order." *Id.*, at 707, 670 P. 2d, at 140.[11] In *Matthews* v. *Pickett County*, 996 S. W. 2d 162 (Tenn. 1999) (on certification to the Sixth Circuit), the court confirmed that the statute mandated arrest for violations of domestic restraining orders, and it held that the "public duty" defense to a negligence action was unavailable to the defendant police officers because the restraining order had created a "special duty" to protect the plaintiff. *Id.*, at 165. See also *Campbell* v. *Campbell*, 294 N. J. Super. 18, 24, 682 A. 2d 272, 274 (1996) (domestic restraining order statute "allows no discretion" with regard to arrest; "[t]he duty imposed on the police officer is ministerial"); *Donaldson* v. *Seattle*, 65 Wash. App. 661, 670, 831 P. 2d 1098, 1103 (1992) ("Generally, where an officer has legal grounds to make an arrest he has considerable discretion to do so. In regard to domestic violence, the rule is the reverse. If the officer has the legal grounds to arrest pursuant to the statute, he has a mandatory duty to make the arrest"). To what extent the Colorado Supreme Court would agree with the views of these courts is, of course, an open question, but it does seem rather brazen for the majority to assume that the Colorado Supreme Court

[11] The Oregon Supreme Court noted that the "widespread refusal or failure of police officers to remove persons involved in episodes of domestic violence was presented to the legislature as the main reason for tightening the law so as to require enforcement of restraining orders by mandatory arrest and custody." *Nearing*, 295 Ore., at 709, 670 P. 2d, at 142.

would repudiate this consistent line of persuasive authority from other States.

Indeed, the Court fails to come to terms with the wave of domestic violence statutes that provides the crucial context for understanding Colorado's law. The Court concedes that, "in the specific context of domestic violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest statutes," *ante*, at 762, but that is a serious understatement. The difference is not a matter of degree, but of kind. Before this wave of statutes, the legal rule was one of discretion; as the Court shows, the "traditional," general mandatory arrest statutes have always been understood to be "mandatory" in name only, see *ante*, at 760. The innovation of the domestic violence statutes was to make police enforcement, not "more mandatory," but simply *mandatory*. If, as the Court says, the existence of a protected "entitlement" turns on whether "government officials may grant or deny it in their discretion," *ante*, at 756, the new mandatory statutes undeniably create an entitlement to police enforcement of restraining orders.

Perhaps recognizing this point, the Court glosses over the dispositive question—whether the police enjoyed discretion to deny enforcement—and focuses on a different question—which "precise means of enforcement," *ante*, at 763, were called for in this case. But that question is a red herring. The statute directs that, upon probable cause of a violation, "a peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person." Colo. Rev. Stat. § 18–6–803.5(3)(b) (Lexis 1999). Regardless of whether the enforcement called for in this case was arrest or the seeking of an arrest warrant (the answer to that question probably changed over the course of the night as the respondent gave the police more information about the husband's whereabouts), the crucial point is that, under the statute, the police were *required* to provide enforcement; *they lacked the discretion to do noth-*

ing.[12] The Court suggests that the fact that "enforcement" may encompass different acts infects any entitlement to enforcement with "indeterminacy." *Ante*, at 763. But this objection is also unfounded. Our cases have never required the object of an entitlement to be some mechanistic, unitary thing. Suppose a State entitled every citizen whose income was under a certain level to receive health care at a state clinic. The provision of health care is not a unitary thing—doctors and administrators must decide what tests are called for and what procedures are required, and these decisions often involve difficult applications of judgment. But it could not credibly be said that a citizen lacks an entitlement to health care simply because the content of that entitlement is not the same in every given situation. Similarly, the enforcement of a restraining order is not some amorphous, indeterminate thing. Under the statute, if the police have probable cause that a violation has occurred, enforcement consists of either making an immediate arrest or seeking a warrant and then executing an arrest—traditional, well-defined tasks that law enforcement officers perform every day.[13]

---

[12] Under the Court's reading of the statute, a police officer with probable cause is mandated to seek an arrest warrant if arrest is "impractical under the circumstances," but then enjoys unfettered discretion in deciding whether to *execute* that warrant. *Ante*, at 764. This is an unlikely reading given that the statute was motivated by a profound distrust of police discretion in the domestic violence context and motivated by a desire to improve the protection given to holders of domestic restraining orders. We do not have the benefit of an authoritative construction of Colorado law, but I would think that if an estranged husband harassed his wife in violation of a restraining order, and then absconded after she called the police, the statute would not only obligate the police to seek an arrest warrant, but also obligate them to execute it by making an arrest. In any event, under respondent's allegations, by the time the police were informed of the husband's whereabouts, an arrest was practical and, under the statute's terms, mandatory.

[13] The Court wonders "how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested." *Ante*, at 762. Again, questions as to the *scope* of the obligation to provide enforcement

The Court similarly errs in speculating that the Colorado Legislature may have mandated police enforcement of restraining orders for "various legitimate ends other than the conferral of a benefit on a specific class of people," *ante*, at 765; see also *ibid.* (noting that the "serving of public rather than private ends is the normal course of the criminal law"). While the Court's concern would have some bite were we

---

are far afield from the key issue—whether there exists an entitlement to enforcement. In any event, the Court's speculations are off base. First, this is not a case like *Donaldson* v. *Seattle*, 65 Wash. App. 661, 831 P. 2d 1098 (1992), in which the restrained person violated the order and then left the scene. Here, not only did the husband violate the restraining order by coming within 100 yards of the family home, but he continued to violate the order while his abduction of the daughters persisted. This is because the restraining order prohibited him from "molest[ing] or disturb-[ing] the peace" of the daughters. See 366 F. 3d, at 1143 (appendix to dissent of O'Brien, J.). Because the "scene" of the violation was wherever the husband was currently holding the daughters, this case does not implicate the question of an officer's duties to arrest a person who has left the scene and is no longer in violation of the restraining order. Second, to the extent that arresting the husband was initially "impractical under the circumstances" because his whereabouts were unknown, the Colorado statute (unlike some other States' statutes) expressly addressed that situation—it *required* the police to seek an arrest warrant. Third, the Court is wrong to suggest that this case falls outside the core situation that these types of statutes were meant to address. One of the well-known cases that contributed to the passage of these statutes involved facts similar to this case. See *Sorichetti* v. *New York City*, 65 N. Y. 2d 461, 467, 482 N. E. 2d 70, 74 (1985) (police officers at police station essentially ignored a mother's pleas for enforcement of a restraining order against an estranged husband who made threats about their 6-year-old daughter; hours later, as the mother persisted in her pleas, the daughter was found mutilated, her father having attacked her with a fork and a knife and attempted to saw off her leg); Note, 1996 U. Ill. L. Rev., at 539 (noting *Sorichetti* in the development of mandatory arrest statutes); see also Sack 1663 (citing the police's failure to respond to domestic violence calls as an impetus behind mandatory arrest statutes). It would be singularly odd to suppose that in passing its sweeping omnibus domestic violence legislation, the Colorado Legislature did not mean to require enforcement in the case of an abduction of children in violation of a restraining order.

faced with a broadly drawn statute directing, for example, that the police "*shall suppress* all riots," there is little doubt that the statute at issue in this case conferred a benefit "on a specific class of people"—namely, recipients of domestic restraining orders. Here, respondent applied for and was granted a restraining order from a Colorado trial judge, who found a risk of "irreparable injury" and found that "physical or emotional harm" would result if the husband were not excluded from the family home. 366 F. 3d, at 1143 (appendix to dissent of O'Brien, J.). As noted earlier, the restraining order required that the husband not "molest or disturb" the peace of respondent and the daughters, and it ordered (with limited exceptions) that the husband stay at least 100 yards away from the family home. *Ibid.*[14] It also directed the police to "use every reasonable means to enforce this . . . order," and to arrest or seek a warrant upon probable cause of a violation. *Id.*, at 1144. Under the terms of the statute, when the order issued, respondent and her daughters became "'protected person[s].'" § 18–6–803.5(1.5)(a) ("'Protected person' means the person or persons identified in the restraining order as the person or persons for whose benefit the restraining order was issued").[15] The statute criminalized the knowing violation of the restraining order, § 18–6–803.5(1), and, as already discussed, the statute (as

---

[14] The order also stated: "If you violate this order thinking that the other party or child named in this order has given you permission, you are wrong, and can be arrested and prosecuted. The terms of this order cannot be changed by agreement of the other party or the child(ren). Only the court can change this order." 366 F. 3d, at 1144 (appendix to dissent of O'Brien, J.).

[15] A concern for the "'protected person'" pervades the statute. For example, the statute provides that a "peace officer may transport, or obtain transportation for, the alleged victim to shelter. Upon the request of the protected person, the peace officer may also transport the minor child of the protected person, who is not an emancipated minor, to the same shelter . . . ." § 18–6–803.5(6)(a).

well as the order itself) mandated police enforcement, §§ 18–6–803.5(3)(a)–(b).[16]

Because the statute's guarantee of police enforcement is triggered by, and operates only in reference to, a judge's granting of a restraining order in favor of an identified "'protected person,'" there is simply no room to suggest that such a person has received merely an "'incidental'" or "'indirect'" benefit, see *ante*, at 766–767. As one state court put it, domestic restraining order statutes "identify with precision when, to whom, and under what circumstances police protection must be afforded. The legislative purpose in requiring the police to enforce individual restraining orders clearly is to protect the named persons for whose protection the order is issued, not to protect the community at large by general law enforcement activity." *Nearing*, 295 Ore., at 712, 670 P. 2d, at 143.[17] Not only does the Court's doubt about

[16] I find it neither surprising nor telling, cf. *ante*, at 766, that the statute requires the restraining order to contain, "in capital letters and bold print," a "notice" informing protected persons that they can demand or request, respectively, civil and criminal contempt proceedings. § 18–6–803.5(7). While the legislature may have thought that these legal remedies were not popularly understood, a person's right to "demand" or "request" police enforcement of a restraining order simply goes without saying given the nature of the order and its language. Indeed, for a holder of a restraining order who has read the order's emphatic language, it would likely come as quite a shock to learn that she has no right to demand enforcement in the event of a violation. To suggest that a protected person has no such right would posit a lacuna between a protected person's rights and an officer's duties—a result that would be hard to reconcile with the Colorado Legislature's dual goals of putting an end to police indifference and empowering potential victims of domestic abuse.

[17] See also *Matthews* v. *Pickett County*, 996 S. W. 2d 162, 165 (Tenn. 1999) ("The order of protection in this case was not issued for the public's protection in general. The order of protection specifically identified Ms. Matthews and was issued solely for the purpose of protecting her. *Cf. Ezell* [v. *Cockrell*, 902 S. W. 2d 394, 403 (Tenn. 1995)] (statute prohibiting drunk driving does not specify an individual but undertakes to protect the public in general from intoxicated drivers)"); *Sorichetti*, 65 N. Y. 2d, at 469, 482 N. E. 2d, at 75 ("The [protective] order evinces a preincident

whether Colorado's statute created an entitlement in a protected person fail to take seriously the purpose and nature of restraining orders, but it fails to account for the decisions by other state courts, see *supra*, at 782–783, that recognize that such statutes and restraining orders create individual rights to police action.

IV

Given that Colorado law has quite clearly eliminated the police's discretion to deny enforcement, respondent is correct that she had much more than a "unilateral expectation" that the restraining order would be enforced; rather, she had a "legitimate claim of entitlement" to enforcement. *Roth*, 408 U. S., at 577. Recognizing respondent's property interest in the enforcement of her restraining order is fully consistent with our precedent. This Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.*, at 571–572. The "types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 430 (1982); see also *Perry* v. *Sindermann*, 408 U. S. 593, 601 (1972) ("'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings'"). Thus, our cases have found "property" interests in a number of state-conferred benefits and services, including welfare benefits, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); disability benefits, *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); public education, *Goss* v. *Lopez*, 419 U. S. 565 (1975); utility services, *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1 (1978); government employment, *Cleveland Bd. of Ed.* v.

---

legislative and judicial determination that its holder should be accorded a reasonable degree of protection from a particular individual").

Loudermill, 470 U. S. 532 (1985), as well as in other entitlements that defy easy categorization, see, *e. g.*, *Bell* v. *Burson*, 402 U. S. 535 (1971) (due process requires fair procedures before a driver's license may be revoked pending the adjudication of an accident claim); *Logan*, 455 U. S., at 431 (due process prohibits the arbitrary denial of a person's interest in adjudicating a claim before a state commission).

Police enforcement of a restraining order is a government service that is no less concrete and no less valuable than other government services, such as education.[18] The relative novelty of recognizing this type of property interest is explained by the relative novelty of the domestic violence statutes creating a mandatory arrest duty; before this innovation, the unfettered discretion that characterized police enforcement defeated any citizen's "legitimate claim of entitlement" to this service. Novel or not, respondent's claim finds strong support in the principles that underlie our due process jurisprudence. In this case, Colorado law *guaranteed* the provision of a certain service, in certain defined circumstances, to a certain class of beneficiaries, and respondent reasonably relied on that guarantee. As we observed in *Roth*, "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

---

[18] The Court mistakenly relies on *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773 (1980), in explaining why it is "by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for purposes of the Due Process Clause." *Ante*, at 766. In *O'Bannon*, the question was essentially whether certain regulations provided nursing-home residents with an entitlement to continued residence in the home of their choice. 447 U. S., at 785. The Court concluded that the regulations created no such entitlement, but there was no suggestion that Congress could not create one if it wanted to. In other words, *O'Bannon* did not address a situation in which the underlying law created an entitlement, but the Court nevertheless refused to treat that entitlement as a property interest within the meaning of the Due Process Clause.

408 U. S., at 577. Surely, if respondent had contracted with a private security firm to provide her and her daughters with protection from her husband, it would be apparent that she possessed a property interest in such a contract. Here, Colorado undertook a comparable obligation, and respondent—with restraining order in hand—justifiably relied on that undertaking. Respondent's claim of entitlement to this promised service is no less legitimate than the other claims our cases have upheld, and no less concrete than a hypothetical agreement with a private firm.[19] The fact that it is based on a statutory enactment and a judicial order entered for her special protection, rather than on a formal contract, does not provide a principled basis for refusing to consider it "property" worthy of constitutional protection.[20]

---

[19] As the analogy to a private security contract demonstrates, a person's interest in police enforcement has "'some ascertainable monetary value,'" *ante*, at 766. Cf. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 964, n. 289 (2000) (remarking, with regard to the property interest recognized in *Goss* v. *Lopez*, 419 U. S. 565 (1975), that "any parent who has contemplated sending their children to private schools knows that public schooling has a monetary value"). And while the analogy to a private security contract need not be precise to be useful, I would point out that the Court is likely incorrect in stating that private security guards could not have arrested the husband under the circumstances, see *ante*, at 766–767, n. 12. Because the husband's ongoing abduction of the daughters would constitute a knowing violation of the restraining order, see n. 13, *supra*, and therefore a crime under the statute, see § 18–6–803.5(1), a private person who was at the scene and aware of the circumstances of the abduction would have authority to arrest. See § 16–3–201 ("A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest"). Our cases, of course, have never recognized any requirement that a property interest possess "'some ascertainable monetary value.'" Regardless, I would assume that respondent would have paid the police to arrest her husband if that had been possible; at the very least, the entitlement has a monetary value in that sense.

[20] According to JUSTICE SOUTER, respondent has asserted a property interest in merely a "state-mandated process," *ante*, at 771 (concurring opinion), rather than in a state-mandated "substantive guarantee,"

V

Because respondent had a property interest in the enforcement of the restraining order, state officials could not deprive her of that interest without observing fair procedures.[21] Her description of the police behavior in this case and the department's callous policy of failing to respond properly to reports of restraining order violations clearly al-

---

ibid. This misunderstands respondent's claim. Putting aside the inartful passage of respondent's brief that JUSTICE SOUTER relies upon, *ante*, at 770, it is clear that respondent is in fact asserting a substantive interest in the "enforcement of the restraining order," Brief for Respondent 10. Enforcement of a restraining order is a tangible, substantive act. If an estranged husband violates a restraining order by abducting children, and the police succeed in enforcing the order, the person holding the restraining order has undeniably just received a substantive benefit. As in other procedural due process cases, respondent is arguing that the police officers failed to follow fair procedures in ascertaining whether the statutory criteria that trigger their obligation to provide enforcement—*i. e.*, an outstanding order plus probable cause that it is being violated—were satisfied in her case. Cf. *Carey* v. *Piphus*, 435 U. S. 247, 266–267 (1978) (discussing analytic difference between the denial of fair process and the denial of the substantive benefit itself). It is JUSTICE SOUTER, not respondent, who makes the mistake of "collapsing the distinction between property protected and the process that protects it," *ante*, at 772.

JUSTICE SOUTER also errs in suggesting that respondent cannot have a property interest in enforcement because she would not be authorized to instruct the police to refrain from enforcement in the event of a violation. *Ante*, at 770. The right to insist on the provision of a service is separate from the right to refuse the service. For example, compulsory attendance laws deny minors the right to refuse to attend school. Nevertheless, we have recognized that minors have a property interest in public education and that school officials must therefore follow fair procedures when they seek to deprive minors of this valuable benefit through suspension. See *Goss*, 419 U. S. 565. In the end, JUSTICE SOUTER overlooks the core purpose of procedural due process—ensuring that a citizen's reasonable reliance is not frustrated by arbitrary government action.

[21] See *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 432 (1982) ("'"While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards"'").

leges a due process violation. At the very least, due process requires that the relevant state decisionmaker *listen* to the claimant and then *apply the relevant criteria* in reaching his decision.[22] The failure to observe these minimal procedural safeguards creates an unacceptable risk of arbitrary and "erroneous deprivation[s]," *Mathews*, 424 U. S., at 335. According to respondent's complaint—which we must construe liberally at this early stage in the litigation, see *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 514 (2002)—the process she was afforded by the police constituted nothing more than a "'sham or a pretense.'" *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 164 (1951) (Frankfurter, J., concurring).

Accordingly, I respectfully dissent.

---

[22] See *Fuentes* v. *Shevin*, 407 U. S. 67, 81 (1972) ("[W]hen a person has an opportunity to speak up in his own defense, and *when the State must listen to what he has to say*, substantively unfair and simply mistaken deprivations of property interests can be prevented" (emphasis added)); *Bell* v. *Burson*, 402 U. S. 535, 542 (1971) ("It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet [the] standard [of due process]"); *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970) ("[T]he decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing"); cf. *ibid.* ("[O]f course, an impartial decision maker is essential").

Syllabus

BELL, WARDEN *v.* THOMPSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–514. Argued April 26, 2005—Decided June 27, 2005

After respondent Thompson was convicted of murder and sentenced to death, Tennessee state courts denied postconviction relief on his claim that his trial counsel had been ineffective for failing to adequately investigate his mental health. His federal habeas attorneys subsequently retained psychologist Dr. Sultan, whose report and deposition contended that Thompson suffered from serious mental illness at the time of his offense. The District Court dismissed the petition, but apparently Thompson's habeas counsel had failed to include Sultan's deposition and report in the record. Upholding the dismissal, the Sixth Circuit, *inter alia*, found no ineffective assistance and did not discuss Sultan's report and deposition in detail. That court later denied rehearing, but stayed issuance of its mandate pending disposition of Thompson's certiorari petition. After this Court denied certiorari on December 1, 2003, the Sixth Circuit stayed its mandate again, pending disposition of a petition for rehearing, which this Court denied on January 20, 2004. A copy of that order was filed with the Sixth Circuit on January 23, but the court did not issue its mandate. The State set Thompson's execution date, and state and federal proceedings began on his competency to be executed. Competency proceedings were pending in the Federal District Court on June 23, 2004, when the Sixth Circuit issued an amended opinion in the federal habeas case, vacating the District Court's habeas judgment and remanding the case for an evidentiary hearing on the ineffective-assistance claim. The Sixth Circuit supplemented the record on appeal with Sultan's deposition and explained that its authority to issue an amended opinion five months after this Court denied rehearing was based on its inherent power to reconsider an opinion before issuance of the mandate.

Held: Assuming that Federal Rule of Appellate Procedure 41 authorizes a stay of a mandate following a denial of certiorari and that a court may stay the mandate without entering an order, the Sixth Circuit's decision to do so here was an abuse of discretion. Pp. 801–814.

(a) This Court need not decide the scope of the court of appeals' Rule 41 authority to withhold a mandate in order to resolve this case. Pp. 801–804.

Syllabus

(b) Prominent among the reasons warranting the result here is that the Sixth Circuit did not release its amended opinion for more than five months after this Court denied rehearing. The consequence of delay for the State's criminal justice system was compounded by the Sixth Circuit's failure to issue an order or otherwise give notice to the parties that it was reconsidering its earlier opinion. The express terms of the Sixth Circuit's stay state that the mandate would be stayed until this Court acted on the rehearing petition. Thus, once rehearing was denied, the stay dissolved by operation of law. Tennessee, relying on the Sixth Circuit's earlier orders and this Court's certiorari and rehearing denials could assume that the mandate would issue, especially since Thompson sought no additional stay and the Sixth Circuit gave no indication that it might be revisiting its earlier decision. The latter point is important, for it is an open question whether a court may exercise its Rule 41(b) authority to extend the time to issue a mandate through mere inaction. Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the Sixth Circuit had stayed the mandate or simply made a clerical mistake. That court could have spared the parties and state judicial system considerable time and resources had it notified them that it was reviewing its decision. The scheduling of Thompson's execution and the resulting competency proceedings were steps taken in reliance on the assumption that the federal habeas case was final. That assumption was all the more reasonable because the delay in issuing the mandate took place after this Court had denied certiorari, which usually signals the end of litigation. See Fed. Rule App. Proc. 41(d)(2)(D). The fact that the Sixth Circuit had the opportunity at the rehearing stage to consider the same arguments it eventually adopted in its amended opinion is yet another factor supporting the determination here. A review of the Sultan deposition also reinforces this conclusion. While the evidence would have been relevant to the District Court's analysis, it is not of such a character as to warrant the Sixth Circuit's extraordinary departure from standard procedures. Finally, by withholding its mandate for months—based on evidence supporting only an arguable constitutional claim—while the State prepared to carry out Thompson's sentence, the Sixth Circuit did not accord the appropriate level of respect to the State's judgment that Thompson's crimes merit the ultimate punishment. See *Calderon* v. *Thompson*, 523 U. S. 538, 554–557. Pp. 804–813.

373 F. 3d 688, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed

a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 814.

Jennifer L. Smith, Associate Deputy Attorney General of Tennessee, argued the cause for petitioner. With her on the briefs were *Paul G. Summers*, Attorney General, *Michael E. Moore*, Solicitor General, *Gordon W. Smith*, Associate Solicitor General, and *Angele M. Gregory*, Assistant Attorney General.

Matthew M. Shors argued the cause *pro hac vice* for respondent. With him on the brief were *Walter Dellinger*, *Charles E. Borden*, and *Daniel T. Kobil*.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to consider whether, after we had denied certiorari and a petition for rehearing, the Court of Appeals had the power to withhold its mandate for more than five months without entering a formal order. We hold that, even assuming a court may withhold its mandate after the denial of certiorari in some cases, the Court of Appeals' decision to do so here was an abuse of discretion.

I

In 1985, Gregory Thompson and Joanna McNamara abducted Brenda Blanton Lane from a store parking lot in Shelbyville, Tennessee. After forcing Lane to drive them to a remote location, Thompson stabbed her to death. Thompson offered no evidence during the guilt phase of trial and was convicted by a jury of first-degree murder.

Thompson's defense attorneys concentrated their efforts on persuading the sentencing jury that Thompson's positive

---

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Paul R. Q. Wolfson, *Noah A. Levine*, and *Joshua L. Dratel* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

qualities and capacity to adjust to prison life provided good reasons for not imposing the death penalty. Before trial, Thompson's counsel had explored the issue of his mental condition. The trial judge referred Thompson to a state-run mental health facility for a 30-day evaluation. The resulting report indicated that Thompson was competent at the time of the offense and at the time of the examination. The defense team retained their own expert, Dr. George Copple, a clinical psychologist. At sentencing Copple testified that Thompson was remorseful and still had the ability to work and contribute while in prison. Thompson presented the character testimony of a number of witnesses, including former high school teachers, his grandparents, and two siblings. Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, also testified on his behalf. She claimed that Thompson's behavior became erratic after he suffered head injuries during an attack by three of his fellow servicemen. In rebuttal the State called Dr. Glenn Watson, a clinical psychologist who led the pretrial evaluation of Thompson's competence. Watson testified that his examination of Thompson revealed no significant mental illness.

The jury sentenced Thompson to death. His conviction and sentence were affirmed on direct review. *State* v. *Thompson*, 768 S. W. 2d 239 (Tenn. 1989), cert. denied, 497 U. S. 1031 (1990).

In his state postconviction petition, Thompson claimed his trial counsel had been ineffective for failing to conduct an adequate investigation into his mental health. Thompson argued that his earlier head injuries had diminished his mental capacity and that evidence of his condition should have been presented as mitigating evidence during the penalty phase of trial. Under Tennessee law, mental illness that impairs a defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a mitigating factor in capital sentencing. Tenn.

Code Ann. § 39–2–203(j)(8) (1982) (repealed); § 39–13–204(j)(8) (Lexis 2003). The postconviction court denied relief following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed. *Thompson* v. *State*, 958 S. W. 2d 156 (1997). The Tennessee Supreme Court denied discretionary review.

Thompson renewed his ineffective-assistance-of-counsel claim on federal habeas. Thompson's attorneys retained a psychologist, Dr. Faye Sultan, to assist with the proceedings. At this point, 13 years had passed since Thompson's conviction. Sultan examined and interviewed Thompson three times, questioned his family members, and conducted an extensive review of his legal, military, medical, and prison records, App. 12, before diagnosing him as suffering from schizoaffective disorder, bipolar type, *id.*, at 20. She contended that Thompson's symptoms indicated he was "suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law." *Ibid.* Sultan prepared an expert report on Thompson's behalf and was also deposed by the State.

In February 2000, the United States District Court for the Eastern District of Tennessee granted the State's motion for summary judgment and dismissed the habeas petition. The court held that Thompson failed to show that the state court's resolution of his claim rested on an unreasonable application of Supreme Court precedent or on an unreasonable determination of the facts in light of the evidence presented in state court. See 28 U. S. C. § 2254(d). The District Court also stated that Thompson had not presented "any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation." No. 4:98–cv–006 (ED Tenn., Feb. 17, 2000), App. to Pet. for

Cert. 270. Sultan's deposition and report, however, had apparently not been included in the District Court record.

While Thompson's appeal to the Court of Appeals for the Sixth Circuit was pending, he filed a motion in the District Court under Federal Rule of Civil Procedure 60(b) requesting that the court supplement the record with Sultan's expert report and deposition. Thompson's habeas counsel at the time explained that the failure to include the Sultan evidence in the summary judgment record was an oversight. Thompson also asked the Court of Appeals to hold his case in abeyance pending a ruling from the District Court and attached the Sultan evidence in support of his motion.

The District Court denied the Rule 60(b) motion as untimely, and the Court of Appeals denied Thompson's motion to hold his appeal in abeyance. On January 9, 2003, a divided panel of the Court of Appeals affirmed the District Court's denial of habeas relief. *Thompson* v. *Bell*, 315 F. 3d 566. The lead opinion, authored by Judge Suhrheinrich, reasoned that there was no ineffective assistance of counsel because Thompson's attorneys were aware of his head injuries and made appropriate inquiries into his mental fitness. *Id.*, at 589–592. In particular, Thompson's attorneys had requested that the trial court order a competency evaluation. A team of experts at the Middle Tennessee Mental Health Institute, a state-run facility, found "no mental illness, mental defect, or insanity." *Id.*, at 589. Dr. George Copple, the clinical psychologist retained by Thompson's attorneys, also "found no evidence of mental illness." *Ibid.* Judge Suhrheinrich emphasized that none of the experts retained by Thompson since trial had offered an opinion on his mental condition at the time of the crime. *Id.*, at 589–592. The lead opinion contained a passing reference to Thompson's unsuccessful Rule 60(b) motion, but did not discuss the Sultan deposition or expert report in any detail. *Id.*, at 583, n. 13. Judge Moore concurred in the result based on Thompson's failure to present "evidence that his counsel

knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime." *Id.*, at 595.

Thompson filed a petition for rehearing. The petition placed substantial emphasis on the Sultan evidence, quoting from both her deposition and expert report. The Court of Appeals denied the petition for rehearing and stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari.

This Court denied certiorari on December 1, 2003. 540 U. S. 1051. The following day, Thompson filed a motion in the Court of Appeals seeking to extend the stay of mandate pending disposition of his petition for rehearing in this Court. The Court of Appeals granted the motion and "ordered that the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court disposes of the case." App. to Pet. for Cert. 348. On January 20, 2004, this Court denied Thompson's petition for rehearing. 540 U. S. 1158. A copy of the order was filed with the Court of Appeals on January 23, 2004. The Court of Appeals, however, did not issue its mandate.

The State, under the apparent assumption that the federal habeas corpus proceedings had terminated, filed a motion before the Tennessee Supreme Court requesting that an execution date be set. The court scheduled Thompson's execution for August 19, 2004.

From February to June 2004, there were proceedings in both state and federal courts related to Thompson's present competency to be executed under *Ford* v. *Wainwright*, 477 U. S. 399 (1986). The state courts, after considering Sultan's testimony (which was based in part on followup observations after her initial 1998 examination) as well as that of other experts, found Thompson competent to be executed. *Thompson* v. *State*, 134 S. W. 3d 168 (Tenn. 2004). Thompson's *Ford* claim was still pending before the Federal District

Court when on June 23, 2004, some seven months after this Court denied certiorari, the Court of Appeals for the Sixth Circuit issued an amended opinion in Thompson's initial federal habeas case. 373 F. 3d 688. The new decision vacated the District Court's judgment denying habeas relief and remanded the case for an evidentiary hearing on Thompson's ineffective-assistance-of-counsel claim. *Id.*, at 691–692. The Court of Appeals relied on its equitable powers to supplement the record on appeal with Sultan's 1999 deposition after finding that it was "apparently negligently omitted" and "probative of Thompson's mental state at the time of the crime." *Id.*, at 691. The court also explained its authority to issue an amended opinion five months after this Court denied a petition for rehearing: "[W]e rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case." *Id.*, at 691–692. Judge Suhrheinrich authored a lengthy separate opinion concurring in part and dissenting in part, which explained that his chambers initiated the *sua sponte* reconsideration of the case. He agreed with the majority about the probative value of the Sultan deposition, referring to the evidence as "critical." *Id.*, at 733. Unlike the majority, however, Judge Suhrheinrich would have relied upon fraud on the court to justify the decision to expand the record and issue an amended opinion. *Id.*, at 725–726, 729–742. He found "implausible" the explanation offered by Thompson's habeas counsel for his failure to include the Sultan deposition in the District Court record, *id.*, at 742, and speculated that counsel "planned to unveil Dr. Sultan's opinion on the eve of Thompson's execution," *id.*, at 738, n. 21.

We granted certiorari. 543 U. S. 1042 (2005).

II

At issue in this case is the scope of the Court of Appeals' authority to withhold the mandate pursuant to Federal Rule of Appellate Procedure 41. As relevant, the Rule provides:

"(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

"(c) Effective Date. The mandate is effective when issued.

"(d) Staying the Mandate.

"(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

"(2) Pending Petition for Certiorari.

"(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

"(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

. . . . .

"(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

Tennessee argues that the Court of Appeals was required to issue the mandate following this Court's denial of Thompson's petition for certiorari. The State's position rests on Rule 41(d)(2)(D), which states that "[t]he court of appeals

must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." This provision, the State points out, admits of no exceptions, so the mandate should have issued on the date that a copy of this Court's order denying certiorari was filed with the Court of Appeals, *i. e.*, December 8, 2003.

The State further contends that because the mandate should have issued in December 2003, the Court of Appeals' amended opinion was in essence a recall of the mandate. If this view is correct, the Court of Appeals' decision to revisit its earlier opinion must satisfy the standard established by *Calderon* v. *Thompson*, 523 U. S. 538 (1998). *Calderon* held that "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.*, at 558. See also *Schlup* v. *Delo*, 513 U. S. 298 (1995); *Sawyer* v. *Whitley*, 505 U. S. 333 (1992).

Thompson counters by arguing that Rule 41(d)(2)(D) is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari. The provision, Thompson says, does not affect the court of appeals' broad discretion to enter a stay for other reasons. He relies on Rule 41(b), which provides the court of appeals may "shorten or extend the time" in which to issue the mandate. Because the authority vested by Rule 41(b) is not limited to the period before a petition for certiorari is denied, he argues that the Court of Appeals had the authority to stay its mandate following this Court's denial of certiorari and rehearing. Although the Court of Appeals failed to issue an order staying the mandate after we denied rehearing, Thompson asserts that the court exercised its Rule 41(b) powers by simply failing to issue it.

To resolve this case, we need not adopt either party's interpretation of Rule 41. Instead, we hold that—assuming,

arguendo, that the Rule authorizes a stay of the mandate following the denial of certiorari and also that a court may stay the mandate without entering an order—here the Court of Appeals abused its discretion in doing so.

III

We find an abuse of discretion for the following reasons.

Prominent among our concerns is the length of time between this Court's denial of certiorari and the Court of Appeals' issuance of its amended opinion. We denied Thompson's petition for certiorari in December 2003 and his petition for rehearing one month later. From this last denial, however, the Court of Appeals delayed issuing its mandate for over five months, releasing its amended opinion in June.

The consequence of delay for the State's criminal justice system was compounded by the Court of Appeals' failure to issue an order or otherwise give notice to the parties that the court was reconsidering its earlier opinion. The Court of Appeals had issued two earlier orders staying its mandate. The first order stayed the mandate pending disposition of Thompson's petition for certiorari. The second order extended the stay to allow Thompson time to file a petition for rehearing with this Court and "thereafter until the Supreme Court disposes of the case." So by the express terms of the second order the mandate was not to be stayed after this Court acted; and when we denied rehearing on January 20, 2004, the Court of Appeals' second stay dissolved by operation of law. Tennessee, acting in reliance on the Court of Appeals' earlier orders and our denial of certiorari and rehearing, could assume that the mandate would—indeed must—issue. While it might have been prudent for the State to verify that the mandate had issued, it is understandable that it proceeded to schedule an execution date. Thompson, after all, had not sought an additional stay of the mandate, and the Court of Appeals had given no indication that it might be revisiting its earlier decision.

This latter point is important. It is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction. Even assuming, however, that a court could effect a stay for a short period of time by withholding the mandate, a delay of five months is different in kind. "Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders." *Murdaugh Volkswagen, Inc.* v. *First National Bank of South Carolina*, 741 F. 2d 41, 44 (CA4 1984). Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake. Cf. *Ballard* v. *Commissioner*, 544 U. S. 40, 59–60 (2005). The dissent claims "the failure to notify the parties was likely due to a simple clerical error" on the part of the Clerk's office. *Post*, at 825 (opinion of BREYER, J.). The record lends no support to this speculation. The dissent also fails to explain why it is willing to apply a "presumption of regularity" to the panel's actions but not to the Clerk's. *Ibid.*

The Court of Appeals could have spared the parties and the state judicial system considerable time and resources if it had notified them that it was reviewing its original panel decision. After we denied Thompson's petition for rehearing, Tennessee scheduled his execution date. This, in turn, led to various proceedings in state and federal court to determine Thompson's present competency to be executed. See, *e. g.*, *Thompson* v. *State*, 134 S. W. 3d 168 (Tenn. 2004). All of these steps were taken in reliance on the mistaken impression that Thompson's first federal habeas case was final. The State had begun to "invok[e] its entire legal and moral authority in support of executing its judgment." *Calderon* v. *Thompson*, *supra*, at 556–557.

The parties' assumption that Thompson's habeas proceedings were complete was all the more reasonable because the Court of Appeals' delay in issuing its mandate took place

after we had denied certiorari. As a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation. While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. See, *e. g.*, *First Gibraltar Bank, FSB* v. *Morales*, 42 F. 3d 895 (CA5 1995); *Alphin* v. *Henson*, 552 F. 2d 1033 (CA4 1977). In the typical case, where the stay of mandate is entered solely to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

By providing a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested, the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent. See Fed. Rule App. Proc. 40(a) ("Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment"). See also Fed. Rules App. Proc. 35 (rehearing en banc), 40 (panel rehearing).

Indeed, in this case Thompson's petition for rehearing and suggestion for rehearing en banc pressed the same arguments that eventually were adopted by the Court of Appeals in its amended opinion. The Sultan evidence, first presented to the Court of Appeals as an attachment to Thompson's motion to hold his appeal in abeyance, was quoted extensively in the petition for rehearing to the Court of Appeals. Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00–5516 (CA6), pp. 12–20, 28–31. After the request for rehearing was denied, the State could have assumed with good reason that the Court of Appeals was not impressed by Thompson's arguments based on the Sultan evidence. The court's opportunity to consider these arguments at the rehearing stage is yet another factor supporting

our determination that the decision to withhold the mandate was in error. Cf. *Calderon* v. *Thompson*, 523 U. S., at 551–553 (questioning whether a "mishandled law clerk transition" and the "failure of another judge to notice the action proposed by the original panel" would justify recalling the mandate in a nonhabeas case).

The dissent's explanation of how the Sultan evidence was overlooked is inaccurate in several respects. For example, the statements that the "Sultan documents were not in the initial record on appeal," *post*, at 821, and that "the panel previously had not seen these documents" before the rehearing stage, *post*, at 822, convey the wrong impression. Although the Sultan evidence was not part of the District Court's summary judgment record, the documents were included in the certified record on appeal as attachments to Thompson's Rule 60(b) motion. Record 133; Docket Entry 4/5/02 in No. 4:98–cv–006 (ED Tenn.); Docket Entry 4/10/02 in No. 00–5516 (CA6). The dissent also argues the petition for rehearing did not adequately bring the Sultan evidence to the attention of the Court of Appeals. *Post*, at 822, 826. This is simply untrue. The original panel opinion, which did not discuss the Sultan evidence in any detail, emphasized that Thompson had failed to produce any evidence that he was mentally ill at the time of his offense. 315 F. 3d, at 590; *id.*, at 595–596 (Moore, J., concurring in result). The petition for rehearing attacked this conclusion in no uncertain terms and placed the Sultan evidence front and center. Here, for example, is an excerpt from the petition's table of contents:

> "II. THE CONCLUSION THAT THERE IS NO EVIDENCE PRESENTED IN THE RECORD OF THOMPSON'S MENTAL ILLESS AT THE TIME OF THE CRIME IS WRONG
>
> "A. Thompson Has Set Forth Above The Record Facts Demonstrating His Mental Illness At The Time Of The Crime

> "B. The Majority Overlooks The Facts And Expert Opinion Set Forth In Dr. Sultan's Report And Deposition." Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00–5516 (CA6), p. ii.

See also *id.*, at 1 (mentioning the Sultan evidence in the second paragraph of the statement in support of panel rehearing). The rehearing petition did not explain why Sultan's deposition and expert report had been omitted from the summary judgment record, but that is beside the point. The petition acknowledged that the Sultan evidence was first presented to the District Court as an attachment to the Rule 60(b) motion, *id.*, at 29, and gave the Sultan evidence a prominent and explicit mention in the table of contents. It is difficult to see how Thompson's counsel could have been clearer in telling the Court of Appeals that it was wrong. The dissent's treatment of this issue assumes that judges forget even the basic details of a capital case only one month after issuing a 38-page opinion and that judges cannot be relied upon to read past the first page of a petition for rehearing. The problem is that the dissent cannot have it both ways: If the Sultan evidence is as crucial as the dissent claims, it would not easily have been overlooked by the Court of Appeals at the rehearing stage.

Our review of the Sultan deposition reinforces our conclusion that the Court of Appeals abused its discretion by withholding the mandate. Had the Sultan deposition and report been fully considered in the federal habeas proceedings, it no doubt would have been relevant to the District Court's analysis. Based on the Sultan deposition, Thompson could have argued he suffered from mental illness at the time of his crime that would have been a mitigating factor under Tennessee law and that his trial attorneys were constitutionally ineffective for failing to conduct an adequate investigation into his mental health.

Relevant though the Sultan evidence may be, however, it is not of such a character as to warrant the Court of Appeals'

extraordinary departure from standard appellate procedures. There are ample grounds to conclude the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim. Sultan examined Thompson for the first time on August 20, 1998, App. 37, some 13 years after Thompson's crime and conviction. She relied on the deterioration in Thompson's present mental health—something that obviously was not observable at the time of trial—as evidence of his condition in 1985. (Indeed, there was a marked decline in his condition during the 6-month period between Sultan's first two visits. *Id.*, at 51–58.) Sultan's findings regarding Thompson's condition in 1985 are contradicted by the testimony of two experts who examined him at the time of trial, Dr. Watson and Dr. Copple. Watson performed a battery of tests at the Middle Tennessee Mental Health Institute, where Thompson was referred by the trial court for an examination, and concluded that Thompson "'[did] not appear to be suffering from any complicated mental disorder which would impair his capacity to appreciate the wrongfulness of the alleged offenses, or which would impair his capacity to conform his conduct to the requirements of the law.'" 19 Tr. 164. Indeed, Watson presented substantial evidence supporting his conclusion that Thompson was malingering for mental illness. *Id.*, at 151–152; 20 *id.*, at 153–160. For example, Thompson claimed he could not read despite a B average in high school and one year's college credit. 19 *id.*, at 137; 20 *id.*, at 151. Thompson's test scores also indicated that he was attempting to fake schizophrenia. 20 *id.*, at 153–154. Copple, the psychologist retained by Thompson's defense team, agreed with Watson that Thompson was not suffering from mental illness. 19 *id.*, at 58. Had the Sultan deposition been included in the District Court record, Thompson still would have faced an uphill battle to obtaining federal habeas relief. He would have had to argue that his trial attorneys should have continued to investigate his men-

tal health even after both Watson and Copple had opined that there was nothing to uncover.

Sultan's testimony does not negate Thompson's responsibility for committing the underlying offense, but it does bear upon an argument that Thompson's attorneys could have presented at sentencing. Sultan's ultimate conclusion—that Thompson's mental illness substantially impaired his ability to conform his conduct to the requirements of the law—is couched in the language of a mitigating factor under Tennessee law. Tenn. Code Ann. § 39–2–203(j)(8) (1982). See also § 39–13–204(j)(8) (Lexis 2003). Thompson's trial attorneys, however, chose not to pursue a mitigation strategy based on mental illness, stressing instead character evidence from family and friends and expert testimony that he had the capacity to adjust to prison. *Thompson* v. *State*, 958 S. W. 2d, at 164–165. This strategic calculation, while ultimately unsuccessful, was based on a reasonable investigation into Thompson's background. Sultan relied on three witnesses in preparing her report: Thompson's grandmother, sister, and ex-girlfriend. These witnesses not only were interviewed by the defense attorneys; they testified at sentencing. Consultation with these witnesses, when combined with the opinions of Watson and Copple, provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy. As the Tennessee Court of Criminal Appeals noted, "Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.*, at 165.

Without a single citation to the record, the dissent suggests that Thompson's attorneys failed to conduct adequate interviews of the defense witnesses on whom Sultan relied in her report. *Post*, at 827–828. Most of the information on Thompson's childhood was provided to Sultan by Nora Jean Wharton, Thompson's older sister. App. 16–18. Set-

ting aside the fact that Thompson did not argue in state court that his counsel's interview of Wharton was inadequate, *Thompson* v. *State*, *supra*, at 160–169, Thompson's attorneys cannot be faulted for failing to elicit from her any details on Thompson's difficult home life. After all, Wharton testified at trial that Thompson's childhood was "poor," but "very happy." 18 Tr. 3. The dissent also implies that the experts who examined Thompson lacked information necessary to reach an accurate assessment. The record refutes this assertion. In conducting his examination, Watson had access to Thompson's social history and military records. 19 *id.*, at 149; 20 *id.*, at 186 (Exh. 102, pp. 11, 27–28). Watson was also aware of the prior head injuries as well as Thompson's claim that he heard voices. 19 *id.*, at 152; 20 *id.*, at 154–155. Nevertheless, Watson, whose evaluation was contemporaneous with the trial, found no evidence that Thompson was mentally ill at the time of the crime. Watson's report was unequivocal on this point:

> "'Mr. Thompson's speech and communication were coherent, rational, organized, relevant, and devoid of circumstantiality, tangentiality, looseness of associations, paranoid ideation, ideas of reference, delusions, and other indicators of a thought disorder. His affect was appropriate to his thought content, and he exhibited no flight of ideas, manic, depressed, or bizarre behaviors, and his speech was not pressured nor rapid. He exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical obser-

> vations revealed no evidence of a thought disorder.) Mr. Thompson's memory for recent and remote events appeared unimpaired.'" 20 *id.*, at 159–160.

Sultan's testimony provides some support for the argument that the strategy of emphasizing Thompson's positive attributes was a mistake in light of Thompson's deteriorated condition 13 years after the trial. This evidence, however, would not come close to satisfying the miscarriage of justice standard under *Calderon* had the Court of Appeals recalled the mandate. Neither, in our view, did this evidence justify the Court of Appeals' decision to withhold the mandate without notice to the parties, which in turn led the State to proceed for five months on the mistaken assumption that the federal habeas proceedings had terminated. The dissent suggests that failing to take account of the Sultan evidence would result in a "miscarriage of justice," *post*, at 814–815, 828, but the dissent uses that phrase in a way that is inconsistent with our precedents. In *Sawyer* v. *Whitley*, 505 U. S., at 345–347, this Court held that additional mitigating evidence could not meet the miscarriage of justice standard. Only evidence that affects a defendant's eligibility for the death penalty—which the Sultan evidence is not—can support a miscarriage of justice claim in the capital sentencing context. *Id.*, at 347; *Calderon*, 523 U. S., at 559–560.

One last consideration informs our review of the Court of Appeals' actions. In *Calderon*, we held that federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 required an additional presumption against recalling the mandate. This case also arises from federal habeas corpus review of a state conviction. While the State's reliance interest is not as strong in a case where, unlike *Calderon*, the mandate has not issued, the finality and comity concerns that animated *Calderon* are implicated here. Here a dedicated judge discovered what he believed to have been an error,

and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived to have been mistaken. A court's discretion under Rule 41 must be exercised, however, in a way that is consistent with the "'State's interest in the finality of convictions that have survived direct review within the state court system.'" *Id.*, at 555 (quoting *Brecht* v. *Abrahamson*, 507 U. S. 619, 635 (1993)). Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago, a sentence that reflects the judgment of the citizens of Tennessee that Thompson's crimes merit the ultimate punishment. By withholding the mandate for months—based on evidence that supports only an arguable constitutional claim—while the State prepared to carry out Thompson's sentence, the Court of Appeals did not accord the appropriate level of respect to that judgment. See *Calderon* v. *Thompson*, *supra*, at 554–557.

The Court of Appeals may have been influenced by Sultan's unsettling account of Thompson's condition during one of her visits. She described Thompson as being in "terrible psychological condition," "physically filthy," and "highly agitated." App. 51. This testimony raised questions about Thompson's deteriorating mental health and perhaps his competence to be executed, but these concerns were properly addressed in separate proceedings. Based on the most recent state-court decision, which rejected the argument that Thompson is not competent to be executed, it appears that his condition has improved. *Thompson* v. *State*, 134 S. W. 3d, at 184–185. Proceedings on this issue were underway in the District Court when the Court of Appeals issued its second opinion. If those proceedings resume, the District Court will have an opportunity to address these matters again and in light of the current evidence.

Taken together these considerations convince us that the Court of Appeals abused any discretion Rule 41 arguably granted it to stay its mandate, without entering a formal

order, after this Court had denied certiorari. The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

This capital case arises out of unusual circumstances—circumstances of a kind that I have not previously experienced in the 25 years I have served on the federal bench. After an appellate court writes and releases an opinion, but before it issues its mandate, the writing judge, through happenstance, comes across a document that (he reasonably believes) shows not only that the court's initial decision is wrong but that the decision will lead to a serious miscarriage of justice. What is the judge to do?

What the judge did here was to spend time—hundreds of hours (while a petition for certiorari was pending before this Court and during the five months following our denial of the petition for rehearing)—reviewing the contents of the vast record with its many affidavits, reports, transcripts, and other documents accumulated in the course of numerous state and federal proceedings during the preceding 20 years. The judge ultimately concluded that his initial instinct about the document was correct. The document was critically important. It could affect the outcome of what is, and has always been, the major issue in the case. To consider the case without reference to it could mean a miscarriage of justice.

The judge consequently wrote a lengthy opinion (almost 30,000 words) explaining what had happened. The other members of the panel did not agree with everything in that opinion, but they did agree that their initial decision must be vacated.

The Court commendably describes what occurred as follows: A "dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived

to have been mistaken." *Ante*, at 812–813. The Court, however, does not decide this case in a manner consistent with that observation. A somewhat more comprehensive account of the nature of the "error"—of the matter at stake, of the importance of the document, of the mystery of its late appearance, of the potential for a miscarriage of justice—should help make apparent the difficult circumstance the panel believed it faced. It will also explain why there was no "abuse" of discretion in the panel's effort to "correct a decision that it perceived to have been mistaken."

I

Judge Suhrheinrich, the panel member who investigated the record, is an experienced federal judge, serving since 1984 as a federal trial court judge and since 1990 as a federal appellate judge. He wrote a lengthy account of the circumstances present here. To understand this case, one must read that full account and then compare it with the Court's truncated version. I provide a rough summary of the matter based upon my own reading of his opinion. 373 F. 3d 688, 692–742 (CA6 2004) (opinion concurring in part and dissenting in part).

A

The panel's initial decision, issued on January 9, 2003, focused upon an issue often raised when federal habeas courts review state proceedings in a capital case, namely, the effectiveness of counsel at the original trial. *Thompson* v. *Bell*, 315 F. 3d 566, 587–594. See *Strickland* v. *Washington*, 466 U. S. 668 (1984). In this instance, the federal ineffective-assistance claim was that state trial counsel had not sufficiently investigated the background of the defendant, Gregory Thompson. Thompson claimed that an adequate investigation would have shown, to the satisfaction of testifying experts, that he suffered from episodes of schizophrenia at the time of the crime. The schizophrenia—though epi-

sodic—would have proved a mitigating circumstance at the penalty phase. 373 F. 3d, at 697–698, and n. 4.

Thompson's trial took place in a Tennessee state court, where he was found guilty of murder and sentenced to death. His state-appointed counsel put on no defense at trial. At sentencing, however, counsel sought to show that Thompson was schizophrenic. State forensic psychologists examined Thompson and concluded that Thompson, probably "malingering," did not show genuine and significant symptoms of schizophrenia at that time and was not mentally ill. A clinical psychologist hired by Thompson's counsel examined Thompson for eight hours and reached approximately the same conclusion: He said that Thompson was not *then* mentally ill. *Id.*, at 692, 694–695.

Thompson raised the issue of his mental condition in state postconviction proceedings, which he initiated in 1990. His expert witness, Dr. Gillian Blair, testified (with much supportive material) that Thompson was by that time clearly displaying serious schizophrenic symptoms—voice illusions, attempts at physical self-mutilation, and the like. Indeed, the State conceded that he was under a regime of major antipsychotic medication. But Dr. Blair said that she could not determine whether Thompson had been similarly afflicted (*i. e.*, suffering from episodes of schizophrenia) at the time of the crime without a thorough background investigation—funds for which the state court declined to make available. The state court then ruled in the State's favor. *Id.*, at 694–695.

Thompson filed a habeas petition in Federal District Court about eight months after the state court's denial of postconviction relief became final. As I said above, see *supra*, at 815 and this page, he claimed ineffective assistance of counsel. The Federal District Court appointed counsel, an assistant federal public defender. Counsel then obtained the services of two experts, Dr. Barry Crown and Dr. Faye Sultan. Both examined Thompson, and the latter, Dr. Sultan,

conducted the more thorough background investigation that Dr. Blair had earlier sought. The State, after deposing Dr. Sultan, moved for summary judgment. 373 F. 3d, at 696, 700–704, 711.

The District Court granted that motion on the ground that "Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime," nor "has Thompson provided this Court with any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." *Id.*, at 712–713 (quoting District Court's memorandum opinion; emphasis and internal quotation marks omitted).

Thompson (now with a new public defender as counsel) appealed the District Court's grant of summary judgment in the State's favor. (A little over a year later, while the appeal was still pending, Thompson's new counsel, apparently having discovered that Dr. Sultan's deposition and report had not been included in the record before the District Court, filed a motion in that court for relief from judgment under Federal Rule of Civil Procedure 60(b), seeking to supplement the record with those documents. Counsel also filed a motion in the appellate court, with the Sultan deposition attached, requesting that the appeal be held in abeyance while the District Court considered the Rule 60(b) motion. Both motions were denied, and Thompson's counsel did not take an appeal from the District Court's denial of the Rule 60(b) motion.) 373 F. 3d, at 714–715, and n. 10, 724–725.

The Court of Appeals reviewed the District Court's grant of summary judgment. In doing so, the appellate panel examined the record before that court. It noted that Thompson's federal habeas counsel had hired two experts (Crown and Sultan), and had told the court (in an offer of proof) that they would provide evidence that Thompson suffered from mental illness *at the time of the crime.* But the appellate

panel found that neither expert had done so. Indeed, said the panel, Thompson had "never submitted to any court *any* proof that he suffered from severe mental illness at the time of the crime." 315 F. 3d, at 590 (emphasis altered). Though Thompson's several attorneys had made the same allegation for many years in several different courts (said the panel), "at each opportunity, counsel fail[ed] to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime." *Ibid.* That fact, concluded the panel (over a dissent), was fatal to Thompson's basic ineffective-assistance-of-counsel claim. Obviously "trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist." *Ibid.*; see also *id.*, at 595 (Moore, J., concurring in result) ("Thompson has presented no evidence that his [trial] counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime"). The dissenting judge thought Thompson had made out an ineffective-assistance claim by showing that his trial counsel had relied on an inadequate expert, that is, an expert without the necessary qualifications to counter the State's experts' conclusions. *Id.*, at 599–605 (opinion of Clay, J.).

The appeals court issued its opinion on January 9, 2003. Thompson's appointed federal appeals counsel filed a rehearing petition, which the court denied on March 10, 2003. See App. to Pet. for Cert. 346 (Order in No. 00–5516 (CA6)). Thompson's counsel then sought Supreme Court review. This Court denied review (and rehearing) about one year later. 540 U. S. 1051 (2003) (denying certiorari); 540 U. S. 1158 (2004) (denying rehearing).

B

The Court of Appeals, following ordinary appellate-court practice, withheld issuance of its mandate while the case was under review here, namely, during calendar year 2003. Dur-

ing that time and in the months that followed, something unusual happened. Judge Suhrheinrich realized that the panel, in reaching its decision, seemed to have overlooked documents provided by Dr. Sultan that likely were relevant. In September 2003, the appellate court called for the entire certified record. Upon reviewing that record, Judge Suhrheinrich found Dr. Sultan's deposition and accompanying report. 373 F. 3d, at 692–693; App. to Pet. for Cert. 347–348; see also Appendix, *infra*.

The Sultan documents filled the evidentiary gap that underlay the District Court's and the appellate panel's determinations. These documents made clear that Dr. Sultan had investigated Thompson's background in depth and that in her (well-supported) opinion, Thompson *had* suffered from serious episodic bouts of schizophrenia *at the time the crime was committed.* Clearly the documents contained evidence supporting Thompson's claim regarding his mental state at the time of the offense. Why had the District Court denied the existence of *any* such evidence? Why had Judge Suhrheinrich, and the other members of the panel (and the State, which took Dr. Sultan's deposition) done the same?

Judge Suhrheinrich then drafted an opinion that sought to answer three questions:

Question One: Do these documents actually provide strong evidence that Thompson was schizophrenic (and seriously so) at the time of the crime?

Question Two: If so, given the many previous opportunities that Thompson has had to raise the issue of his mental health, to what extent would these documents be likely to matter in respect to the legal question raised in Thompson's federal proceedings, *i. e.*, would they likely lead a federal habeas court to hold that Thompson's trial counsel was ineffective for failing to undertake a background investigation akin to that performed by Dr. Sultan?

Question Three: How did these documents previously escape our attention?

1

The panel answered the first question—regarding the importance of the documents—unanimously. Dr. Sultan's report and deposition were critically important. As Judge Suhrheinrich's opinion explains, these documents detail Thompson's horrendous childhood, his family history of mental illness, his self-destructive schizophrenic behavior (including auditory hallucinations) as a child, his mood swings and bizarre behavior as a young adult, and a worsening of that behavior after a serious beating to his head that he suffered while in the Navy. For example, Dr. Sultan's examination of Thompson and her interviews with Thompson's family members and others revealed that as a child Thompson would repeatedly bang his head against the wall to "knock the Devil out" after his grandmother yelled at him, "You have the Devil in you." 373 F. 3d, at 716 (internal quotation marks omitted). These documents explain how Thompson, as a young adult, would talk to himself and scream and cry for no apparent reason. They suggest that he had bouts of paranoia.

The documents provide strong support for the conclusion that Thompson suffered from episodes of schizophrenia at the time of the offense. And they thereby offer significant support for the conclusion that, had earlier testifying experts had this information, they could have countered the State's experts' conclusion that Thompson was malingering at the time of trial. Thus, the Sultan materials seriously undermined the foundation of the State's position in respect to Thompson's mental condition.

The Sultan materials also revealed that trial counsel failed to discover other mitigating evidence of importance. Interviews with family members revealed repeated incidents of violence in the family, including an episode in which, as a young boy, Thompson witnessed his father brutally beat and rape his mother. His grandmother, with whom Thompson

and his siblings lived after their mother died, subjected them to abuse and neglect. She would forget to feed the children, leaving them to steal money from under her bed to buy food. These and other circumstances are detailed in sections of the Sultan report and deposition reproduced in the Appendix, *infra*.

2

The panel also responded unanimously and affirmatively to the second question: Would federal-court access to the Sultan documents likely have made a significant difference in respect to the federal legal question at issue in Thompson's habeas petition, namely, the failure of Thompson's trial counsel to investigate his background? Trial counsel had had important indications that something was wrong. Indeed, counsel himself had sought an evaluation of Thompson's mental condition. He also was aware of Thompson's violent behavior in the military, and knew that Thompson had said he had had auditory hallucinations all his life. He was aware, too, of the changes in Thompson's behavior. Should counsel not then have investigated further?

The Sultan documents make clear that, had he done so, he would have had a strong answer to the State's experts. Thus the documents were relevant to the outcome of the federal habeas proceedings. The Federal District Court based its grant of summary judgment on the premise that there was *no* evidence supporting Thompson's claim. The documents showed that precisely such evidence was then available.

3

The panel (while disagreeing about how to allocate blame) agreed in part about the answer to the third question: how these documents previously had escaped the panel's attention. The judges agreed that the Sultan documents were not in the initial record on appeal. The panel's original opin-

ion, while mentioning both Dr. Sultan and Dr. Crown, assumed that neither expert had addressed Thompson's mental condition at the time of the crime. 315 F. 3d, at 583, n. 13 ("Sultan's affidavit does not discuss Thompson's mental state *at the time of the offense*" (emphasis added)); *ibid.* (explaining that Thompson filed a Rule 60(b) motion to supplement the record with Dr. Sultan's report, but not mentioning that the report addressed Thompson's mental condition at the time of the offense); see also *supra*, at 817–818.

How had the panel overlooked the copies of the Sultan deposition attached to (1) the rehearing petition and (2) the (Rule 60(b)-related) motion to hold the appeal in abeyance? As for the rehearing petition, the reason could well lie in the petition's (incorrect) suggestion that the panel had already considered the appended document as part of the original record. See Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00–5516 (CA6), p. 1 ("A majority of this panel overlooked other proof in the record, including but not limited to, the expert opinion of Dr. Faye E. Sultan"); see also *id.*, at 28–32. While the petition explains the importance of the documents, it does not explain the circumstances, namely, that the panel previously had not seen these documents. Instead, it gives the impression that counsel was simply reemphasizing a matter the panel had already considered. To that extent, the petition reduced the likelihood that the panel would make the connection it later made and fatally weakened its argument for *re*-hearing.

As for the motion to hold the appeal in abeyance, the panel's failure to recognize the significance of the appended Sultan materials is also understandable. The motion gives the impression that the appellate court would have been able to handle any problem arising from the exclusion of these materials in an appeal taken from the District Court's Rule 60(b) decision. The appellate court, however, never had any such opportunity because counsel did not appeal the District Court's denial of the Rule 60(b) motion.

C

Once the panel understood the significance of the Sultan report, it had to decide what to do. An appellate court exists to correct legal errors made in the trial court. What legal error had the District Court committed? The appeal concerned its grant of summary judgment in the State's favor. The District Court made that decision on the basis of the record before it, and that record apparently lacked the relevant documents. How then could an appeals court say that the District Court was wrong to grant the summary judgment motion?

The panel answered this question by *not* holding that the District Court had erred. Finding that the Sultan documents had been "apparently negligently omitted" from the record, it exercised its equitable powers to supplement the record with the deposition. 373 F. 3d, at 691. It also found that, since the State itself had helped to create that document (because the State had taken Dr. Sultan's deposition), the District Court's reconsideration of the matter would not unfairly prejudice the State. And it noted that this case is a death case. Then, relying on its "inherent power to reconsider" an opinion "prior to the issuance of the mandate," the court issued a new opinion, vacating the District Court's grant of summary judgment to the State and remanding the case to the District Court for further proceedings on the matter. *Ibid.*

II

The question before us is not whether we, as judges, would have come to the same conclusions as did the panel of the Court of Appeals. It is whether the three members of the appellate panel abused their discretion in reconsidering the matter and, after agreeing unanimously that they would have reached a different result had they considered the overlooked evidence, vacating the District Court's judgment and remanding the case.

The Court concludes that the panel's reconsideration of the matter and decision to vacate the District Court's judgment amounted to an "abuse of discretion." *Ante*, at 796. It therefore reverses the panel's unanimous interlocutory judgment remanding a capital case to the District Court for an evidentiary hearing. The Court lists five reasons why the Court of Appeals "abused its discretion." *Ante*, at 804. None of these reasons, whether taken separately or considered together, stands up to examination.

Reason One. During the 5-month period after this Court denied rehearing of Thompson's certiorari petition, during which time the Court of Appeals was reconsidering the matter, it gave "no indication that it might be revisiting its earlier decision." Had it "notified" the parties, the court "could have spared the parties and the state judicial system considerable time and resources." *Ante*, at 804, 805.

If this consideration favors the Court's conclusion, it does so to a very modest degree. For one thing, the Federal Rules themselves neither set an unchangeable deadline for issuance of a mandate nor require notice when the court enlarges the time for issuance. Compare Fed. Rule App. Proc. 41(b) (2005) ("The court may shorten or extend the time") with Rule 41(a) (1968) (mandate "shall" issue "unless the time is shortened or enlarged *by order*" (emphasis added)). The Advisory Committee Notes to Rule 41 expressly contemplate that the parties will themselves check the docket to determine whether the mandate has issued. See Advisory Committee's 1998 Note on subd. (c) of Rule 41 ("[T]he parties can easily calculate the anticipated date of issuance and verify issuance of the mandate[;] the entry of the order on the docket alerts the parties to that fact"). And Sixth Circuit Rules require the Circuit Clerk to provide all parties with copies of the mandate. See Internal Operating Procedure 41(a) (CA6 2005) ("Copies of the mandate are distributed to all parties and the district court clerk's office"). Thus, the State's attorneys knew, or certainly should have known, that

the mandate had not issued, and, as experienced practitioners, they also knew, or certainly should have known, that a proceeding is not technically over until the court has issued its mandate. And if concerned by the delay (and some delay in such matters is not uncommon), they could have asked the Circuit Clerk why the mandate had not issued. If necessary, they could have filed a motion seeking that information or seeking the mandate's immediate issuance.

For another thing, since notification is a clerical duty, the panel may have thought the parties *had* been notified. One of the judges on the panel could well have instructed the Circuit Clerk not to issue the mandate, and then simply have assumed that the Clerk would notify the parties of that fact (though the Clerk, perhaps inadvertently, did not do so). Why would the court want to hide what it was doing from the parties? Once we apply a presumption of regularity to the panel's actions, we must assume that the failure to notify the parties was likely due to a simple clerical error.

Further, the prejudice to the State that troubles the Court was likely small or nonexistent. The need to reset an execution date is not uncommon, and the state court's execution order explicitly foresaw that possibility. See 373 F. 3d, at 692 (Tennessee Supreme Court order set Thompson's execution date for August 19, 2004, "unless otherwise ordered by this Court or other appropriate authority" (internal quotation marks omitted)). Moreover, the State has not even argued—despite ample opportunity to do so—that the further proceedings ordered by the panel would actually have required it to set a new date.

Finally, the State did not, by way of a petition for rehearing, make any of its "failure to notify" arguments to the Court of Appeals. Although the law does not require the State to seek rehearing, such a petition would have permitted the panel to explain why the State was not notified and possibly to explore the matter of prejudice. There is no rea-

son to reward the State for not filing a petition by assuming prejudice where none appears to exist.

Given the State's likely knowledge that the mandate had not issued, the existence of avenues for resolving any uncertainty, and the small likelihood of prejudice, the lack of notice does not significantly advance the Court's "abuse of discretion" finding. Indeed, if the Court believes that the Court of Appeals could have issued a revised opinion correcting its earlier judgment *if only it had given notice to the parties*, the sanction it now imposes—outright reversal—is far out of proportion to the crime.

Reason Two. The court's "opportunity to consider" the Sultan evidence "at the rehearing stage is yet another factor supporting" the abuse-of-discretion "determination." *Ante*, at 806–807. I agree that it is unfortunate that, upon review of the rehearing petition, the panel failed to make the connection that would have allowed it, at that time, to reach the same conclusion it reached later. Still, the petition wrongly implied that the Sultan documents were part of the original appeal. Because it did not request rehearing on the ground that the documents were *not* in the record, it did not offer a genuine "opportunity to consider" the Sultan evidence.

Under these circumstances, I cannot agree that the court's opportunity to consider these documents at the rehearing stage should militate in favor of finding an abuse of discretion. To the contrary, I believe we should encourage, rather than discourage, an appellate panel, when it learns that it has made a serious mistake, to take advantage of an opportunity to correct it, rather than to ignore the problem.

Reason Three. The "Sultan evidence . . . is not of such a character as to warrant [a] departure from standard appellate procedures" because "the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim." *Ante*, at 808–809. *That is to say, given the expert testimony in the trial court, the Sultan evidence is unlikely meaningfully to have*

strengthened Thompson's claim before the Federal District Court. Ante, at 808–810.

This conclusion is wrong. The Court argues the following: (1) Dr. Sultan's conclusion rests in significant part upon interviews with three witnesses, Thompson's grandmother and sister (with whom Dr. Sultan spoke directly) and his girlfriend (whose interview with a defense investigator Dr. Sultan reviewed); (2) since all three of these witnesses testified at sentencing, Thompson's counsel must have consulted them at the time; and (3) "[c]onsultation with these witnesses, when combined with the opinions of [the State's expert] and [Thompson's expert], provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy." *Ante,* at 810. The Court then says that trial counsel's "strategy" may have been "a mistake," *ante,* at 812, but apparently not enough of a mistake to amount to inadequate assistance of counsel.

But how do the Court's conclusions follow from the premises? Dr. Sultan's interview of the three witnesses apparently turned up new information, indeed, crucial information. Why does that fact not tend to show that trial counsel's own "consultation" with those witnesses was inadequate? Or, if trial counsel was aware of the information, why does that not tend to show that trial counsel hired an expert who was not qualified to assess Thompson's mental condition, or that counsel failed adequately to convey the critical information to that expert? This Court in *Wiggins* v. *Smith,* 539 U. S. 510, 523–525 (2003), found trial counsel inadequate for failing to conduct a reasonable investigation, given notice that such an investigation would likely turn up important mitigating evidence. See also *Rompilla* v. *Beard, ante,* p. 374. Why is the same not true here, where Thompson's trial counsel was fully aware of the need for a background investigation, and then either did not ask the right questions, or did not hire the right expert, or did not convey the right information

to that expert? At the least, is there not a good argument to this effect—an argument that the Sultan documents significantly strengthened? All three judges on the panel thought so: They concluded that they would have reached a different result on Thompson's ineffective-assistance-of-counsel claim had they been aware of the Sultan documents. The Court does not satisfactorily explain its basis for second-guessing the panel on this point.

Reason Four. The Sultan evidence does "not come close to satisfying the miscarriage of justice standard under Calderon." *Ante*, at 812 (referring to *Calderon* v. *Thompson*, 523 U. S. 538 (1998)). As the Court apparently agrees, see *ante*, at 803–804, *Calderon* does not apply here. And the panel's basic conclusion—that consideration of Thompson's ineffective-assistance-of-counsel claim without the benefit of the Sultan evidence would constitute a grave miscarriage of justice—survives *any* plausible standard of review. I can find nothing in the Court's opinion that explains why the panel's conclusion is wrong.

Reason Five. The Court of Appeals "did not accord the appropriate level of respect" to the State's "judgment." *Ante*, at 813. If by "judgment" the Court means to refer to the state court's original judgment of conviction, this reason simply repeats Reason Four. The panel carefully examined the entire record and determined that there is a significant likelihood the Sultan evidence would demonstrate a violation of the Federal Constitution.

If the Court means to refer to the state court's judgment not to set aside the conviction in state postconviction proceedings, the Court is clearly wrong. The state court on collateral review refused to authorize funds for a background investigation, one for which Thompson's expert then showed a strong need, and which Thompson's expert now shows could well have demonstrated a significantly mitigating mental condition. How is it disrespectful of the State for a federal habeas court to identify a constitutional error that

occurred in state-court proceedings in a capital case, by taking account of a key piece of evidence, mistakenly omitted from the record?

If the Court means to refer to the State's decision to proceed with the execution, I cannot possibly agree. The Court could not mean that *any* exercise by a federal court to correct an inadvertent, and important, evidentiary error is "disrespectful" of a State's effort to proceed to execution. But if it does not mean "any" exercise at all, then how can it say the present exercise is disrespectful? The present exercise embodies as thorough an examination of the record and as significant a piece of evidence as one is likely to find. The process—the detail and care with which the Court of Appeals combed the record—does not show "disrespect." It shows the contrary.

The upshot is that the Court's five reasons are unconvincing. The Court simply states those reasons as conclusions. It fails to show how, or why, the unanimous panel erred in reaching diametrically opposite conclusions, all supported with detailed evidence set forth in Judge Suhrheinrich's opinion. It does not satisfactorily explain the evidentiary basis for its own conclusions. And, in the process, it loses sight of the question before us: again, *not* whether we, as judges, would have reached the same conclusion that the three judges on the panel reached, but rather whether they, having unanimously agreed that their earlier decision was wrong, abused their discretion in setting it right.

III

Ultimately this case presents three kinds of questions. The first is a narrow legal question. Has the Court of Appeals abused its discretion? For the reasons I have set forth, the answer to that question, legally speaking, must be "no."

The second is an epistemological question. How, in respect to matters involving the legal impact of the Sultan

report and deposition, can the Court replace the panel's judgment with its own? Judge Suhrheinrich's opinion demonstrates why any assessment of that legal impact must grow out of thorough knowledge of the record. He spent hundreds of hours with its numerous documents in order to make that assessment. Those of his conclusions that were shared by the other members of the panel are logical, rest upon record-based facts, and are nowhere refuted (in respect to those facts) by anything before us or by anything in the Court's opinion. How can the Court know that the panel is wrong?

The third question is about basic jurisprudence. A legal system is based on rules; it also seeks justice in the individual case. Sometimes these ends conflict. To take account of such conflict, the system often grants judges a degree of discretion, thereby providing oil for the rule-based gears. When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result. The American judicial system has long sought to avoid that divorce. Today's decision takes an unfortunate step in the wrong direction.

APPENDIX TO OPINION OF BREYER, J.

Excerpts from the Gregory Thompson Psychological Report prepared by Dr. Faye E. Sultan at the Riverbend Maximum Security Institution (RMSI) (July 22, 1999), App. 11–20.

"REFERRAL QUESTIONS:

"Mr. Gregory Thompson was referred for psychological evaluation in July, 1998 by attorney Mr. Stephen M. Kissinger of the Federal Defender Services of Eastern Tennessee Incorporated. Mr. Thompson was convicted of murder in 1985. This evaluation was requested to address the following questions:

"1. Mr. Thompson's current psychological status[.]

"2. Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.

"3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have be[en] considered to be mitigating in nature at the time of his trial.

"PROCEDURE:

"Psychological evaluation of Mr. Thompson was initiated on August 20, 1998. This first evaluation session extended over a period of approximately four hours and consisted of clinical interview and the administration of the Minnesota Multiphasic Personality Inventory–2 (MMPI–2). Some review of prior psychological evaluation records was conducted to establish what formal psychological and neuropsychological testing had been administered to Mr. Thompson. Levels of current intellectual and neuropsychological functioning had been recently assessed by neuropsychologist, Barry Crown, Ph.D., so no attempt was made to replicate this type of assessment.

"Following the 8–20–98 initial evaluation session, a very extensive review of legal, military, medical, prison and psychiatric/psychological records was initiated. A list of the documents examined is attached to this report.

. . . . .

" . . . Two further interviews were conducted with Mr. Thompson for [the] limited purpose [of determining Thompson's competence to participate in habeas proceedings], on 2–2–99 and 4–7–99, totaling approximately six hours of additional observation. Voluminous Tennessee Department of Corrections mental health, medical, and administrative records were reviewed at this time as well.

. . . . .

"[T]he extensive record review conducted, the ten hours of clinical observations made of Mr. Thompson during the preceding eleven months, the interviews conducted with collateral informants, and the recent and past psychological testing which had been administered provide enough data to make it possible to render professional opinions about Mr. Thompson's mental state at and around the time of the 1985 offense.

"CLINICAL OBSERVATIONS:

"Mr. Gregory Thompson was cooperative with the assessment procedure. He answered all questions posed to him and appeared to be alert, watchful and interested in the interview process. His speech was sometimes tangential and rambling. Although motor behavior appeared controlled there was a manic quality to his verbalizations. Mr. Thompson was oriented as to person, place and time, but he repeatedly expressed his firm belief that he had written each and every song which played on the radio.

"Mr. Thompson displayed symptoms of psychosis during the two subsequent meetings. The details of these sessions will not be reviewed here.

"FORMAL PSYCHOLOGICAL TESTING:

"The Minnesota Multiphasic Personality Inventory–2 (MMPI–2) was administered to Mr. Thompson on 8–20–98. It had been determined in other examination settings that Mr. Thompson's level of reading competence exceeded the necessary level of 8th grade ability required for proper administration of this test.

"The MMPI–2 profile produced by Mr. Thompson is considered valid and appropriate for interpretation. Individuals producing similar profiles are described as experiencing significant psychological difficulties and chronic psychological maladjustment. Such individuals are considered to be highly suspicious of others, often displaying paranoid fea-

tures. There is indication in this profile of the presence of a thought disorder and the inability to manage emotions. The world is perceived as a threatening and dangerous place and fears are viewed as externally generated and reality-based rather than as a product of an internally generated state. The behavior of such individuals is often described as hostile, aggressive, and rebellious against authority. Poor impulse control, lack of trust in others, and low frustration tolerance may result in such individuals displaying rage in interpersonal relationships.

"Individuals producing this testing profile are also described as experiencing depressed mood. There is the strong possibility that such individuals have contemplated suicide and report preoccupation with feeling guilty and unworthy. Testing items were endorsed which suggest memory and concentration problems, and an inability to make decisions.

"RELEVANT PSYCHOLOGICAL/PSYCHIATRIC DATA CONTAINED IN RECORDS:

"The[re] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of . . . his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self-destructive behavior.

"INTERVIEWS WITH COLLATERAL WITNESSES:

"Five individuals were interviewed (either by telephone or face-to-face) who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson.

"Ms. Maybelle Lamar

"Ms. Lamar is Mr. Thompson's maternal grandmother. She was interviewed by telephone on July 21, 1999. Ms. Lamar assumed total responsibility for the care and rearing of Mr. Thompson and his two older siblings after his mother was killed when Mr. Thompson was approximately five years old. Mr. Thompson remained in her home until he entered the military as a young adult.

"Ms. Lamar recalls the period following her daughter's fatal automobile accident as one of tremendous strain and disruption for her. She was unable to describe the reaction of the three young children to their mother's death because she 'took to my bed' for approximately five or six weeks following the accident. Ms. Lamar was unable to attend to these children in any way at that time. She did not recall how they obtained food or clothing, or whether they were in any distress. Ms. Lamar reported that she was drinking alcohol quite heavily during this period and that she left her bed to resume household activities only because the children contracted a serious medical illness.

"Ms. Lamar described Mr. Thompson as displaying significantly 'different' behavior when he returned to visit her following his discharge from the U. S. Navy. 'Greg didn't act the same'. Unlike the 'eager to please', passive, sometimes funny, gentle boy who she had reared, Mr. Thompson was 'angry', 'sometimes sad'. 'I don't think he wanted me to know what was going on with him. He mostly just stayed away from me.' Ms. Lamar reported that she noticed Mr. Thompson sometimes 'staring off into space' or 'talking to himself'. She would ask him about these behaviors.

'He'd deny it. He acted like he didn't know what I was talking about.' Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked these questions at any time before or during Mr. Thompson's trial.

"Ms. Nora Jean Hall Wharton

"Nora Jean Wharton is Mr. Thompson's older sister. A lengthy telephone interview was conducted with her on July 21, 1999. She grew up in the same home as Mr. Thompson and had continuous contact with him throughout his childhood. Mr. Thompson lived briefly in the home of his sister following his discharge from the military.

"Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar[,] was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg Thompson frequently witnessed his sister Nora being beaten by their grandmother.

"Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.

"Ms. Wharton reported that Greg would frequently cry at school during the early school years, and, as a result, was often the victim of intense mockery from his classmates.

Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.

"Of particular significance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg 'You have the Devil in you.' Mr. Thompson would tell his sister that he was attempting to 'knock the Devil out' of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.

"Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a len[g]thy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

"Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and antidepressant medications. She reported that her younger half-sister Kim has also suffered from significant mental illness.

"CUSTODY OFFICERS AT RMSI

"Following the second interview conducted with Mr. Thompson on 2–2–99, I informally interviewed two custody officers who escorted Mr. Thompson back to his cell. These officers have not as yet been identified by name. Both reported that they were aware that Mr. Thompson was quite mentally ill and that they were concerned about him. They further reported that they believed it would be in his best interest to be housed in a prison facility better equipped to deal with individuals experiencing severe mental illness.

"MICHAEL CHAVIS

"Federal Defender Services of Eastern Tennessee investigator, Mr. Michael Chavis, was interviewed about his July 29 through August 2, 1998 interview with Ms. Arlene Cajulao in Honolulu, Hawaii. Ms. Cajulao and Mr. Thompson had an intimate relationship and lived together for approximately four years, from 1980 to 1984.

"Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions prov[ided] by Ms. Nora Wharton, Ms. Cajulao reported several episodes of 'paranoid' and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were 'after' him. He would close all the curtains in the house because he did not want the person who was 'looking' for him to see him through the curtains. She remembers being quite concerned about Mr. Thompson's mental state.

"SUMMARY AND CONCLUSIONS:

"Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as

early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.

"It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.

"Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

"It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

"[signed]

"Faye E. Sultan, Ph.D."

* * *

Excerpts from the Deposition of Dr. Faye E. Sultan (July 22, 1999), *id.*, at 71–73, 76–80.

"Q. What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?

"A. . . . . .

"By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally abusive in the following fashion: She would yell at him you have the devil in you, boy. [His sister, Ms. Wharton] would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking of it as very odd.

. . . . . .

"Q. Sort of a self-punishment or a self-exorcism type thing?

"A. A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent hysterical crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript. She told me much more detail about actually the extent of those kind[s] of emotional outbursts.

"At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the time, and Nora Wharton was not really permitted much interaction outside of their home.

. . . . . .

"Q. Your diagnosis for Mr. Thompson is schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

"A. What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur—lots of different kinds of delusions actually—auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

"The psychological testing early on in Mr. Thompson's incarceration confirm[s] the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

"The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

"Q. You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

"A. Well . . . prior to his entry into the military Mr. Thompson is described almost uniformly . . . as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

"At some point . . . he began to notice that people were trying to hurt him all the time, that officers and other people

of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

"Q. This is what he related to you during your interview last August?

"A. Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, 'different.' Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said that was very different from the boy who left her to go into service.

"The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her

to approach her grandmother about what to do for treatment for him.

. . . . . .

"Q. You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

"A. There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

"Q. So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

"A. Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

"Q. Meaning?

"A. Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't. He is often embarrassed about his behavior afterwards, but there are points at which I believe he's not in control of what he's doing.

"Q. When you say 'he's not in control of what he's doing,' are you saying that it's impulsive behavior?

"A. If I am emotionally disregulated, if I'm over-aroused and overreactive and I operate out of a faulty belief system, so that not only do I have the impulse to do things that I ordinarily wouldn't, but I also think things are going on that aren't, I have a combination in which yes, I suppose you

could call it impulse, but you also have to take the notion into account that it might be an impulse to do something that doesn't make any sense.

"Q. Does this disorder prevent Mr. Thompson from planning his activities?

"A. Sometimes, yes, it does.

"Q. And so the inability to plan, would that be a factor that would prevent him from conforming his conduct to the requirements of the law?

"A. If that were in operation at some time. In the history of the Department of Corrections' mental health records, when he's properly medicated I don't think that's true about him.

"Q. Is it your professional opinion, then, that when he is medicated he has the ability to plan, but when he is not medicated he does not always have the ability to plan?

"A. Those two things are true. It's also true that if he's inadequately medicated or improperly medicated he doesn't have the ability to plan anything. I don't know whether he has impulses. I think he's all impulse, so to have impulses implies that there's a part of you that's not impulsive. For example, when Mr. Chavis and I saw him during my second interview with him, he could not have planned anything at all, not beyond the nanosecond in which he was experiencing the world. But he was receiving psychotropic medications at the time, so that's why I have to put that qualifier in there."

Syllabus

McCREARY COUNTY, KENTUCKY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03–1693. Argued March 2, 2005—Decided June 27, 2005

After petitioners, two Kentucky Counties, each posted large, readily visible copies of the Ten Commandments in their courthouses, respondents, the American Civil Liberties Union (ACLU) et al., sued under 42 U. S. C. § 1983 to enjoin the displays on the ground that they violated the First Amendment's Establishment Clause. The Counties then adopted nearly identical resolutions calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The resolutions noted several grounds for taking that position, including the state legislature's acknowledgment of Christ as the "Prince of Ethics." The displays around the Commandments were modified to include eight smaller, historical documents containing religious references as their sole common element, *e. g.*, the Declaration of Independence's "endowed by their Creator" passage. Entering a preliminary injunction, the District Court followed the *Lemon* v. *Kurtzman*, 403 U. S. 602, test to find, *inter alia*, that the original display lacked any secular purpose because the Commandments are a distinctly religious document, and that the second version lacked such a purpose because the Counties narrowly tailored their selection of foundational documents to those specifically referring to Christianity. After changing counsel, the Counties revised the exhibits again. No new resolution authorized the new exhibits, nor did the Counties repeal the resolutions that preceded the second one. The new posting, entitled "The Foundations of American Law and Government Display," consists of nine framed documents of equal size. One sets out the Commandments explicitly identified as the "King James Version," quotes them at greater length, and explains that they have profoundly influenced the formation of Western legal thought and this Nation. With the Commandments are framed copies of, *e. g.*, the Star Spangled Banner's lyrics and the Declaration of Independence, accompanied by statements about their historical and legal significance. On the ACLU's motion, the District Court included this third display in the injunction despite the Counties' professed intent to show that the Commandments were part of the foundation of American Law and Government and to educate county citizens as to the documents. The court took proclaiming the Commandments' foundational value as a religious,

rather than secular, purpose under *Stone* v. *Graham*, 449 U. S. 39, and found that the Counties' asserted educational goals crumbled upon an examination of this litigation's history. Affirming, the Sixth Circuit stressed that, under *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with a secular message. The court saw no integration here because of a lack of a demonstrated analytical or historical connection between the Commandments and the other documents.

Held:

1. A determination of the Counties' purpose is a sound basis for ruling on the Establishment Clause complaints. The Counties' objective may be dispositive of the constitutional enquiry. Pp. 859–866.

(a) *Lemon*'s "secular legislative purpose" enquiry, 403 U. S., at 612, has been a common, albeit seldom dispositive, element of this Court's cases, *Wallace* v. *Jaffree*, 472 U. S. 38, 75. When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 335. A purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding . . . that liberty and social stability demand a . . . tolerance that respects the religious views of all citizens." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 718. Pp. 859–861.

(b) The Court declines the Counties' request to abandon *Lemon*'s purpose test. Their assertions that true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent, are as seismic as they are unconvincing. Examination of purpose is a staple of statutory interpretation for every American appellate court, *e. g.*, *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 600, and governmental purpose is a key element of a good deal of constitutional doctrine, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229. Scrutinizing purpose makes practical sense in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact set forth in a statute's text, legislative history, and implementation or comparable official act. *Wallace* v. *Jaffree*, *supra*, at 73–74. Nor is there any indication that the purpose enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed. Pp. 861–863.

(c) The Court also avoids the Counties' alternative tack of trivializing the purpose enquiry. They would read the Court's cases as if the enquiry were so naive that any transparent claim to secularity would

satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for these arguments, or reason supporting them. Pp. 863–866.

(1) A legislature's stated reasons will generally warrant the deference owed in the first instance to such official claims, but *Lemon* requires the secular purpose to be genuine, not a sham, and not merely secondary to a religious objective, see, *e. g., Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 308. In those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one. See, *e. g., Stone, supra*, at 41. Pp. 864–865.

(2) The Counties' argument that purpose in a case like this should be inferred only from the latest in a series of governmental actions, however close they may all be in time and subject, bucks common sense. Reasonable observers have reasonable memories, and the Court's precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose." *Santa Fe, supra*, at 315. P. 866.

2. Evaluation of the Counties' claim of secular purpose for the ultimate displays may take their evolution into account. The development of the presentation should be considered in determining its purpose. Pp. 867–874.

(a) *Stone* is the Court's initial benchmark as its only case dealing with the constitutionality of displaying the Commandments. It recognized that the Commandments are an "instrument of religion" and that, at least on the facts before the Court, their text's display could presumptively be understood as meant to advance religion: although state law specifically required their posting in classrooms, their isolated exhibition did not allow even for an argument that secular education explained their being there. 449 U. S., at 41, n. 3. But *Stone* did not purport to decide the constitutionality of every possible way the government might set out the Commandments, and under the Establishment Clause detail is key, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 595. Hence, the Court looks to the record showing the progression leading up to the Commandments' third display, beginning with the first. Pp. 867–868.

(b) There are two obvious similarities between the display *Stone* rejected and the first one here: both set out the Commandments' text as distinct from any traditionally symbolic representation like blank tablets, and each stood alone, not as part of an arguably secular display. *Stone* stressed the significance of integrating the Commandments into

a secular scheme to forestall the broadcast of an otherwise clearly religious message, 449 U. S., at 42, and for good reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods), regulate details of religious obligation (no graven images, sabbath breaking, or vain oath swearing), and unmistakably rest even the universally accepted prohibitions (as against murder, theft, etc.) on the sanction of the divinity proclaimed at the text's beginning. Displaying that text is thus different from symbolic representation, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith. Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view. The display in *Stone* had no such context, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the *Stone* postings. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message. Pp. 868–869.

(c) The Counties' second display, unlike the first, did not hang the Commandments in isolation, but included the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents whose references to God were highlighted as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties posted the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolutions' claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose. Pp. 869–870.

(d) The lower courts' conclusion that no legitimizing secular purpose prompted the Counties' third display, the "Foundations of American Law and Government" exhibit, is amply justified. That display placed the Commandments in the company of other documents the Counties deemed especially significant in the historical foundation of American government. In trying to persuade the District Court to lift the preliminary injunction, the Counties cited several new purposes for the third version, including a desire to educate county citizens as to the significance of the documents displayed. The Counties' claims, however, persuaded neither that court, which was intimately familiar with this litigation's details, nor the Sixth Circuit. Where both lower courts were unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one. *Edwards* v. *Aguillard*, 482 U. S.

578, 594. The Counties' new statements of purpose were presented only as a litigating position, there being no further authorizing resolutions by the Counties' governing boards. And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second displays passed just months earlier were not repealed or otherwise repudiated. Indeed, the sectarian spirit of the resolutions found enhanced expression in the third display, which quoted more of the Commandments' purely religious language than the first two displays had done. No reasonable observer, therefore, could accept the claim that the Counties had cast off the objective so unmistakable in the earlier displays. Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. For example, it is at least odd in a collection of documents said to be "foundational" to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original framing. An observer would probably suspect the Counties of reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality. Pp. 870–873.

(e) In holding that the preliminary injunction was adequately supported by evidence that the Counties' purpose had not changed at the third stage, the Court does not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. The Court holds only that purpose is to be taken seriously under the Establishment Clause and is to be understood in light of context. District courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions. Nor does the Court hold that a sacred text can never be integrated constitutionally into a governmental display on law or history. Its own courtroom frieze depicts Moses holding tablets exhibiting a portion of the secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating religious neutrality. Pp. 873–874.

354 F. 3d 438, affirmed.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 881. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, and in which KENNEDY, J., joined as to Parts II and III, *post*, p. 885.

Counsel

Mathew D. Staver argued the cause for petitioners. With him on the briefs were *Erik W. Stanley, Rena M. Lindevaldsen, Bruce W. Green,* and *Mary E. McAlister.*

Acting Solicitor General Clement argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Keisler, Deputy Assistant Attorney General Katsas, Patricia A. Millett, Robert M. Loeb,* and *Lowell V. Sturgill, Jr.*

David A. Friedman argued the cause for respondents. With him on the brief were *Lili R. Lutgens* and *Steven R. Shapiro.**

---

*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Troy King,* Attorney General of Alabama, *Kevin C. Newsom,* Solicitor General, and *Charles B. Campbell,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Charles J. Crist, Jr.,* of Florida, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.,* of Louisiana, *Jim Hood* of Mississippi, *Jim Petro* of Ohio, *Gerald J. Pappert* of Pennsylvania, *Henry McMaster* of South Carolina, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, and *Patrick J. Crank* of Wyoming; for the State of Minnesota et al. by *Mike Hatch,* Attorney General of Minnesota, and *John S. Garry,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Jeremiah W. (Jay) Nixon* of Missouri, *Patricia A. Madrid* of New Mexico, *W. A. Drew Edmondson* of Oklahoma, and *Peggy A. Lautenschlager* of Wisconsin; for the American Center for Law and Justice by *Jay Alan Sekulow, Stuart J. Roth, Francis J. Manion,* and *Walter M. Weber;* for the American Legion by *Kelly Shackelford* and *Philip B. Onderdonk, Jr.;* for the American Liberties Institute et al. by *Frederick H. Nelson;* for the Ashbrook Center for Public Affairs et al. by *Steven C. Seeger;* for the Becket Fund for Religious Liberty by *Anthony R. Picarello, Jr.;* for the Conservative Legal Defense and Education Fund et al. by *Herbert W. Titus* and *William J. Olson;* for the Eagle Forum Education & Legal Defense Fund by *Douglas G. Smith* and *Phyllis Schlafly;* for Faith and Action et al. by *Bernard P. Reese, Jr.;* for the Family Research Council, Inc., et al. by *Robert P. George;* for the Foundation for Moral Law, Inc., by *Benjamin D. DuPré* and *Gregory M. Jones;* for Judicial Watch, Inc., by *Paul J. Orfanedes* and *Meredith L. Cavallo;* for the Pacific Justice Institute by *Peter D. Lepiscopo;* for the Rutherford Institute by *John W.*

JUSTICE SOUTER delivered the opinion of the Court.

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code," Def. Exh. 1 in Memorandum in Support of Defendants' Motion to Dismiss in Civ. Action No. 99–507, p. 1 (ED Ky.) (hereinafter Def. Exh. 1). The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.

The issues are whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular purpose for the ultimate displays may take their evolution into account. We hold that the counties' manifest objective may be dispositive of the constitutional

---

Whitehead; for the Thomas More Law Center by *Edward L. White III;* and for Wallbuilders, Inc., by *Barry C. Hodge.*

Briefs of *amici curiae* urging affirmance were filed for American Atheists by *Robert J. Bruno;* for the American Humanist Association et al. by *Elizabeth L. Hileman;* for Americans United for Separation of Church and State et al. by *William M. Hohengarten, Ian Heath Gershengorn, Ayesha Khan, Richard B. Katskee,* and *Judith E. Schaeffer;* for the Anti-Defamation League et al. by *Jeffrey R. Babbin, Aaron S. Bayer, Kenneth D. Heath, Frederick M. Lawrence, Daniel S. Alter,* and *Steven M. Freeman;* for the Atheist Law Center et al. by *Pamela L. Sumners* and *Larry Darby;* for the Baptist Joint Committee et al. by *Douglas Laycock, Jeffrey P. Sinensky, K. Hollyn Hollman,* and *Marc D. Stern;* for the Council for Secular Humanism et al. by *Ronald A. Lindsay;* for the Freedom from Religion Foundation by *James A. Friedman* and *James D. Peterson;* and for Legal Historians and Law Scholars by *Steven K. Green.*

Julie Underwood filed a brief of *amici curiae* for the National School Boards Association et al.

enquiry, and that the development of the presentation should be considered when determining its purpose.

I

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus.[1] In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in 'a very high traffic area' of the courthouse." 96 F. Supp. 2d 679, 684 (ED Ky. 2000). In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. Dodson, Commonwealth Journal, July 25, 1999, p. A1, col. 2, in Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction in Civ. Action No. 99–509 (ED Ky.) (internal quotation marks omitted). The Judge-Executive was accompanied by the pastor of his church, who called the Commandments "a creed of ethics" and told the press after the ceremony that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." *Id.*, at A2, col. 3 (internal quotation marks omitted). In both Counties, this was the version of the Commandments posted:

"Thou shalt have no other gods before me.

---

[1] We do not consider here a display of the Ten Commandments in schoolrooms in Harlan County, Kentucky, that was litigated in consolidated proceedings in the District Court and Court of Appeals. That display is the subject of a separate petition to this Court.

"Thou shalt not make unto thee any graven images.

"Thou shalt not take the name of the Lord thy God in vain.

"Remember the sabbath day, to keep it holy.

"Honor thy father and thy mother.

"Thou shalt not kill.

"Thou shalt not commit adultery.

"Thou shalt not steal.

"Thou shalt not bear false witness.

"Thou shalt not covet.

"Exodus 20:3–17."[2] Def. Exh. 9 in Memorandum in Support of Defendants' Motion to Dismiss in Civ. Action No. 99–507 (ED Ky.) (hereinafter Def. Exh. 9).

In each County, the hallway display was "readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote." 96 F. Supp. 2d, at 684; *American Civil Liberties Union of Kentucky* v. *Pulaski County*, 96 F. Supp. 2d 691, 695 (ED Ky. 2000).

In November 1999, respondents American Civil Liberties Union of Kentucky et al. sued the Counties in Federal District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983, and sought a preliminary injunction against maintaining the displays, which the ACLU charged were violations of the prohibition of religious establishment included in the First Amendment of the Constitution.[3] Within a month, and be-

[2] This text comes from a record exhibit showing the Pulaski County Commandments that were part of the County's first and second displays. The District Court found that the displays in each County were functionally identical. 96 F. Supp. 2d 679, 682, n. 2 (ED Ky. 2000); 96 F. Supp. 2d 691, 693, n. 2 (ED Ky. 2000).

[3] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This prohibition of establishment applies to "the States

fore the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously . . . to adjourn . . . 'in remembrance and honor of Jesus Christ, the Prince of Ethics' "; that the "County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction." Def. Exh. 1, at 1–3, 6.

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted, *id.*, at 9. In addition to the first display's large framed copy of the edited King James version of the Commandments,[4] the second included eight other documents in smaller frames, each either having a religious

---

and their political subdivisions" through the Fourteenth Amendment. *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 301 (2000).

[4] The District Court noted that there was some confusion as to whether the Ten Commandments hung independently in the second display, or were incorporated into the copy of the page from the Congressional Record declaring 1983 "the Year of the Bible." 96 F. Supp. 2d, at 684, and n. 4; 96 F. Supp. 2d, at 695–696, and n. 4. The exhibits in the record depict the Commandments hanging as a separate item, Def. Exh. 9, and that is more consistent with the Counties' description of the second display in this Court. "[After erecting the first display] Petitioners posted additional donated documents. . . . This display consisted of the Ten Commandments along with other historical documents." Brief for Petitioners 2. Like the District Court, we find our analysis applies equally to either format.

theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact. 96 F. Supp. 2d, at 684; 96 F. Supp. 2d, at 695–696.

After argument, the District Court entered a preliminary injunction on May 5, 2000, ordering that the "display . . . be removed from [each] County Courthouse IMMEDIATELY" and that no county official "erect or cause to be erected similar displays." 96 F. Supp. 2d, at 691; 96 F. Supp. 2d, at 702–703. The court's analysis of the situation followed the three-part formulation first stated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). As to governmental purpose, it concluded that the original display "lack[ed] any secular purpose" because the Commandments "are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God." 96 F. Supp. 2d, at 686; 96 F. Supp. 2d, at 698. Although the Counties had maintained that the original display was meant to be educational, "[t]he narrow scope of the display—a single religious text unaccompanied by any interpretation explaining its role as a foundational document—can hardly be said to present meaningfully the story of this country's religious traditions." 96 F. Supp. 2d, at 686–687; 96 F. Supp. 2d, at 698. The court found that the second version also "clearly lack[ed] a secular purpose" because the "Count[ies] narrowly tailored [their] selection of

foundational documents to incorporate only those with specific references to Christianity."[5] 96 F. Supp. 2d, at 687; 96 F. Supp. 2d, at 699.

The Counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the "King James Version" at Exodus 20:3–17, 145 F. Supp. 2d 845, 847 (ED Ky. 2001), and quoted at greater length than before:

> "Thou shalt have no other gods before me.
>
> "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.
>
> "Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.
>
> "Remember the sabbath day, to keep it holy.
>
> "Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.
>
> "Thou shalt not kill.

---

[5] The court also found that the display had the effect of endorsing religion: "Removed from their historical context and placed with other documents with which the only common link is religion, the documents have the undeniable effect of endorsing religion." 96 F. Supp. 2d, at 688; 96 F. Supp. 2d, at 699–700.

> "Thou shalt not commit adultery.
>
> "Thou shalt not steal.
>
> "Thou shalt not bear false witness against thy neighbour.
>
> "Thou shalt not covet thy neighbour's house, thou shalt not covet th[y] neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is th[y] neighbour's." App. to Pet. for Cert. 189a.

Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled "The Foundations of American Law and Government Display" and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

> "The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *Id.*, at 180a.

The ACLU moved to supplement the preliminary injunction to enjoin the Counties' third display,[6] and the Counties responded with several explanations for the new version, in-

[6] Before the District Court issued the modified injunction, the Counties removed the label of "King James Version" and the citation to Exodus. 145 F. Supp. 2d 845, 847 (ED Ky. 2001).

cluding desires "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." 145 F. Supp. 2d, at 848 (internal quotation marks omitted). The court, however, took the objective of proclaiming the Commandments' foundational value as "a religious, rather than secular, purpose" under *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*, 145 F. Supp. 2d, at 849, and found that the assertion that the Counties' broader educational goals are secular "crumble[s] . . . upon an examination of the history of this litigation," *ibid.* In light of the Counties' decision to post the Commandments by themselves in the first instance, contrary to *Stone*, and later to "accentuat[e]" the religious objective by surrounding the Commandments with "specific references to Christianity," the District Court understood the Counties' "clear" purpose as being to post the Commandments, not to educate.[7] 145 F. Supp. 2d, at 849–850 (internal quotation marks omitted).

As requested, the trial court supplemented the injunction, and a divided panel of the Court of Appeals for the Sixth Circuit affirmed. The Circuit majority stressed that under *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry "a secular message," 354 F. 3d 438, 449 (2003). The majority judges saw no integration here because of a "lack of a demonstrated analytical or historical connection [be-

---

[7] The court also found that the effect of the third display was to endorse religion because the "reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents" and because the "reasonable observer [would know] something of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments." *Id.*, at 851, 852.

tween the Commandments and] the other documents." *Id.*, at 451. They noted in particular that the Counties offered no support for their claim that the Ten Commandments "provide[d] the moral backdrop" to the Declaration of Independence or otherwise "profoundly influenced" it. *Ibid.* (internal quotation marks omitted). The majority found that the Counties' purpose was religious, not educational, given the nature of the Commandments as "an active symbol of religion [stating] 'the religious duties of believers.'" *Id.*, at 455. The judges in the majority understood the identical displays to emphasize "a single religious influence, with no mention of any other religious or secular influences," *id.*, at 454, and they took the very history of the litigation as evidence of the Counties' religious objective, *id.*, at 457.

Judge Ryan dissented on the basis of wide recognition that religion, and the Ten Commandments in particular, have played a foundational part in the evolution of American law and government; he saw no reason to gainsay the Counties' claim of secular purposes. *Id.*, at 472–473. The dissent denied that the prior displays should have any bearing on the constitutionality of the current one: a "history of unconstitutional displays can[not] be used as a sword to strike down an otherwise constitutional display."[8] *Id.*, at 478.

We granted certiorari, 543 U. S. 924 (2004), and now affirm.

---

[8] The Sixth Circuit did not decide whether the display had the impermissible effect of advancing religion because one judge, having found the display motivated by a religious purpose, did not reach that issue. 354 F. 3d, at 462 (Gibbons, J., concurring). The other judge in the majority concluded that a reasonable observer would find that the display had the effect of endorsing religion given the lack of analytical connection between the Commandments and the other documents in the display, the courthouse location of the display, and the history of the displays. *Id.*, at 458–459. The dissent found no effect of endorsement because it concluded that a reasonable observer would only see that the County had merely acknowledged the foundational role of the Ten Commandments rather than endorsed their religious content. *Id.*, at 479–480.

II

Twenty-five years ago in a case prompted by posting the Ten Commandments in Kentucky's public schools, this Court recognized that the Commandments "are undeniably a sacred text in the Jewish and Christian faiths" and held that their display in public classrooms violated the First Amendment's bar against establishment of religion. *Stone*, 449 U. S., at 41. *Stone* found a predominantly religious purpose in the government's posting of the Commandments, given their prominence as "'an instrument of religion,'" *id.*, at 41, n. 3 (quoting *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 224 (1963)). The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain. In the alternative, the Counties would avoid the District Court's conclusion by having us limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.

A

Ever since *Lemon* v. *Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has "a secular legislative purpose" has been a common, albeit seldom dispositive, element of our cases. 403 U. S., at 612. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*,[9] and "the secular purpose requirement alone may rarely be determinative . . . , it nevertheless serves an important function."[10] *Wallace* v.

---

[9] *Stone* v. *Graham*, 449 U. S. 39, 41 (1980) *(per curiam)*; *Wallace* v. *Jaffree*, 472 U. S. 38, 56–61 (1985); *Edwards* v. *Aguillard*, 482 U. S. 578, 586–593 (1987); *Santa Fe*, 530 U. S., at 308–309.

[10] At least since *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to

Jaffree, 472 U. S. 38, 75 (1985) (O'CONNOR, J., concurring in judgment).

The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15–16 (1947); *Wallace*, *supra*, at 53. When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 335 (1987) ("*Lemon*'s 'purpose' requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters"). Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . ." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 718 (2002) (BREYER, J., dissenting). By showing a purpose to favor religion, the government "sends the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . .'" *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 309–310 (2000) (quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring)).

Indeed, the purpose apparent from government action can have an impact more significant than the result expressly

---

hold governmental action legitimate even where its manifest purpose was presumably religious. See, *e. g.*, *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (upholding legislative prayer despite its religious nature). No such reasons present themselves here.

decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable. This is the teaching of *McGowan* v. *Maryland*, 366 U. S. 420 (1961), which upheld Sunday closing statutes on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws. *Id.*, at 449–451.

B

Despite the intuitive importance of official purpose to the realization of Establishment Clause values, the Counties ask us to abandon *Lemon*'s purpose test, or at least to truncate any enquiry into purpose here. Their first argument is that the very consideration of purpose is deceptive: according to them, true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent. The assertions are as seismic as they are unconvincing.

Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, *e. g.*, *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 600 (2004) (interpreting statute in light of its "text, structure, purpose, and history"), and governmental purpose is a key element of a good deal of constitutional doctrine, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229 (1976) (discriminatory purpose required for Equal Protection violation); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 352–353 (1977) (discriminatory purpose relevant to dormant Commerce Clause claim); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993) (discriminatory purpose raises level of scrutiny required by free exercise claim). With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflect-

ing attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.

But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. *Wallace*, 472 U. S., at 74 (O'CONNOR, J., concurring in judgment). The eyes that look to purpose belong to an "'objective observer,'" one who takes account of the traditional external signs that show up in the "'text, legislative history, and implementation of the statute,'" or comparable official act. *Santa Fe*, *supra*, at 308 (quoting *Wallace*, *supra*, at 76 (O'CONNOR, J., concurring in judgment)); see also *Edwards* v. *Aguillard*, 482 U. S. 578, 594–595 (1987) (enquiry looks to "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage"). There is, then, nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause.

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. In *Wallace*, for example, we inferred purpose from a change of wording from an earlier statute to a later one, each dealing with prayer in schools. 472 U. S., at 58–60. And in *Edwards*, we relied on a statute's text and the detailed public comments of its sponsor, when we sought the purpose of a state law requiring creationism to be taught alongside evolution. 482 U. S., at 586–588. In other cases, the government action itself bespoke the purpose, as in *Abington*, where the object of required Bible study in public schools was patently religious, 374 U. S., at 223–224; in *Stone*, the Court held that the "[p]osting of religious texts on the wall serve[d] no . . . educational function," and found that if "the posted copies of the Ten Commandments [were] to have any effect at all, it

[would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U. S., at 42. In each case, the government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action.

Nor is there any indication that the enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed. In the past, the test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing religion. That said, one consequence of the corollary that Establishment Clause analysis does not look to the veiled psyche of government officers could be that in some of the cases in which establishment complaints failed, savvy officials had disguised their religious intent so cleverly that the objective observer just missed it. But that is no reason for great constitutional concern. If someone in the government hides religious motive so well that the "'objective observer, acquainted with the text, legislative history, and implementation of the statute,'" *Santa Fe*, 530 U. S., at 308 (quoting *Wallace*, *supra*, at 76 (O'CONNOR, J., concurring in judgment)), cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.

C

After declining the invitation to abandon concern with purpose wholesale, we also have to avoid the Counties' alternative tack of trivializing the enquiry into it. The Counties would read the cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it, and

they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the Counties' arguments, or reason supporting them.

1

Lemon said that government action must have "a secular . . . purpose," 403 U. S., at 612, and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. See, *e. g.*, *Santa Fe*, *supra*, at 308 ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one' "); *Edwards*, 482 U. S., at 586–587 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham"); *id.*, at 590, 594 (referring to enquiry as one into "preeminent" or "primary" purpose); *Stone*, *supra*, at 41 (looking to the "pre-eminent purpose" of government action).

Even the Counties' own cited authority confirms that we have not made the purpose test a pushover for any secular claim. True, *Wallace* said government action is tainted by its object "if it is entirely motivated by a purpose to advance religion," 472 U. S., at 56, a remark that suggests, in isolation, a fairly complaisant attitude. But in that very case the Court declined to credit Alabama's stated secular rationale of "accommodation" for legislation authorizing a period of silence in school for meditation or voluntary prayer, given the implausibility of that explanation in light of another statute already accommodating children wishing to pray. *Id.*, at 57, n. 45 (internal quotation marks omitted). And it would

be just as much a mistake to infer that a timid standard underlies the statement in *Lynch* v. *Donnelly* that the purpose enquiry looks to whether government "activity was motivated wholly by religious considerations," 465 U. S., at 680; for two cases cited for that proposition had examined and rejected claims of secular purposes that turned out to be implausible or inadequate:[11] *Stone, supra*, at 41; *Abington*, 374 U. S., at 223–224.[12] See also *Bowen* v. *Kendrick*, 487 U. S. 589, 602 (1988) (using the "motivated wholly by an impermissible purpose" language, but citing *Lynch* and *Stone*). As we said, the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.[13]

---

[11] Moreover, JUSTICE O'CONNOR provided the fifth vote for the *Lynch* majority and her concurrence emphasized the point made implicitly in the majority opinion that a secular purpose must be serious to be sufficient. 465 U. S., at 691 (The purpose inquiry "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes").

[12] *Stone* found the sacred character of the Ten Commandments preeminent despite an avowed secular purpose to show their "adoption as the fundamental legal code of Western Civilization and the Common Law . . . ." 449 U. S., at 39–40, n. 1 (internal quotation marks omitted). And the *Abington* Court was unconvinced that music education or the teaching of literature were actual secular objects behind laws requiring public school teachers to lead recitations from the Lord's Prayer and readings from the Bible. 374 U. S., at 273.

[13] The dissent nonetheless maintains that the purpose test is satisfied so long as any secular purpose for the government action is apparent. *Post*, at 901–902 (opinion of SCALIA, J.). Leaving aside the fact that this position is inconsistent with the language of the cases just discussed, it would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action. While heightened deference to legislatures is appropriate for the review of economic legisla-

2

The Counties' second proffered limitation can be dispatched quickly. They argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show, *Santa Fe*, 530 U. S., at 308 (objective observer is familiar with "'implementation of'" government action (quoting *Wallace*, *supra*, at 76 (O'CONNOR, J., concurring in judgment))); *Edwards*, *supra*, at 595 (enquiry looks to "the historical context of the statute . . . and the specific sequence of events leading to [its] passage"); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 780 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears"). The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose."[14] *Santa Fe*, *supra*, at 315.

---

tion, an approach that credits any valid purpose, no matter how trivial, has not been the way the Court has approached government action that implicates establishment.

[14] One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters. Just as Holmes's dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose. The dis-

III

This case comes to us on appeal from a preliminary injunction. We accordingly review the District Court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion.[15] *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656 (2004).

We take *Stone* as the initial legal benchmark, our only case dealing with the constitutionality of displaying the Commandments. *Stone* recognized that the Commandments are an "instrument of religion" and that, at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion: although state law specifically required their posting in public school classrooms, their isolated exhibition did not leave room even for an argument that secular education explained their being there. 449 U. S., at 41, n. 3 (internal quotation marks omitted). But *Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key. *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 595

---

sent, apparently not giving the reasonable observer as much credit as Holmes's dog, contends that in practice it will be "absur[d]" to rely upon differences in purpose in assessing government action. *Post*, at 907. As an initial matter, it will be the rare case in which one of two identical displays violates the purpose prong. In general, like displays tend to show like objectives and will be treated accordingly. But where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another. See *supra*, at 860–861. While posting the Commandments may not have the effect of causing greater adherence to them, an ostensible indication of a purpose to promote a particular faith certainly will have the effect of causing viewers to understand the government is taking sides.

[15] We note that the only factor in the preliminary injunction analysis that is at issue here is the likelihood of the ACLU's success on the merits.

(1989) (opinion of Blackmun, J.) ("[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears" (internal quotation marks and citation omitted)). Hence, we look to the record of evidence showing the progression leading up to the third display of the Commandments.

A

The display rejected in *Stone* had two obvious similarities to the first one in the sequence here: both set out a text of the Commandments as distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display. *Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message, 449 U. S., at 42, and for good reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods). They regulate details of religious obligation (no graven images, no sabbath breaking, no vain oath swearing). And they unmistakably rest even the universally accepted prohibitions (as against murder, theft, and the like) on the sanction of the divinity proclaimed at the beginning of the text. Displaying that text is thus different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith. Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view. The display in *Stone* had no context that might have indicated an object beyond the religious character of the text, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the

postings at issue in *Stone*.[16] See also *County of Allegheny*, *supra*, at 598 ("Here, unlike in *Lynch* [v. *Donnelly*], nothing in the context of the display detracts from the crèche's religious message"). Actually, the posting by the Counties lacked even the *Stone* display's implausible disclaimer that the Commandments were set out to show their effect on the civil law.[17] What is more, at the ceremony for posting the framed Commandments in Pulaski County, the county executive was accompanied by his pastor, who testified to the certainty of the existence of God. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message.

This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.

B

Once the Counties were sued, they modified the exhibits and invited additional insight into their purpose in a display that hung for about six months. This new one was the product of forthright and nearly identical Pulaski and McCreary County resolutions listing a series of American historical documents with theistic and Christian references, which

---

[16] Although the Counties point out that the courthouses contained other displays besides the Ten Commandments, there is no suggestion that the Commandments display was integrated to form a secular display.

[17] In *Stone*, the Commandments were accompanied by a small disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 449 U. S., at 39–40, n. 1 (internal quotation marks omitted).

were to be posted in order to furnish a setting for displaying the Ten Commandments and any "other Kentucky and American historical documen[t]" without raising concern about "any Christian or religious references" in them. Def. Exh. 1, at 1. As mentioned, the resolutions expressed support for an Alabama judge who posted the Commandments in his courtroom, and cited the fact the Kentucky Legislature once adjourned a session in honor of "Jesus Christ, the Prince of Ethics." *Id.*, at 2–3.

In this second display, unlike the first, the Commandments were not hung in isolation, merely leaving the Counties' purpose to emerge from the pervasively religious text of the Commandments themselves. Instead, the second version was required to include the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolution's claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.

Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as "dead and buried." Reply Brief for Petitioners 15. Their refusal to defend the second display is understandable, but the reasonable observer could not forget it.

C

1

After the Counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one. The result was the "Foundations of American Law and Gov-

ernment" exhibit, which placed the Commandments in the company of other documents the Counties thought especially significant in the historical foundation of American government. In trying to persuade the District Court to lift the preliminary injunction, the Counties cited several new purposes for the third version, including a desire "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."[18] 145 F. Supp. 2d, at 848 (internal quotation marks omitted). The Counties' claims did not, however, persuade the court, intimately familiar with the details of this litigation, or the Court of Appeals, neither of which found a legitimizing secular purpose in this third version of the display. "'When both courts [that have already passed on the case] are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.'" *Edwards*, 482 U. S., at 594, n. 15 (quoting *Wallace*, 472 U. S., at 66 (Powell, J., concurring)). The conclusions of the two courts preceding us in this case are well warranted.

These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards. And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose,[19] the extraordinary resolutions for the second display passed just months earlier were not repealed or other-

[18] The Counties' other purposes were:

"to erect a display containing the Ten Commandments that is constitutional; . . . to demonstrate that the Ten Commandments were part of the foundation of American Law and Government; . . . [to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the Declaration of Independence and the foundation of our legal tradition.'" 145 F. Supp. 2d, at 848 (some internal quotation marks omitted).

[19] Following argument in this case, in which the resolutions were discussed, the McCreary and Pulaski County Boards did repeal the resolutions, acts of obviously minimal significance in the evolution of the evidence.

wise repudiated.[20] Indeed, the sectarian spirit of the common resolution found enhanced expression in the third display, which quoted more of the purely religious language of the Commandments than the first two displays had done; for additions, see App. to Pet. for Cert. 189a ("I the LORD thy God am a jealous God") (text of Second Commandment in third display); ("the LORD will not hold him guiltless that taketh his name in vain") (text of Third Commandment); and ("that thy days may be long upon the land which the LORD thy God giveth thee") (text of Fifth Commandment). No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.

Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that "fish-weirs shall be removed from the Thames." *Id.*, at 205a, ¶ 33. If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a

---

[20] The Counties argue that the objective observer would not continue to believe that the resolution was in effect after the third display went up because the resolution authorized only the second display. But the resolution on its face is not limited to any particular display. On the contrary, it encourages the creation of a display with the Ten Commandments that also includes such documents as "the National anthem . . . the National Motto . . . the preamble to the Kentucky Constitution[,] the Declaration of Independence [and] the Mayflower Compact . . . without censorship because of any Christian or religious references." Def. Exh. 1, at 1. The third display contains all of these documents, suggesting that it fell within the resolutions as well. The record does not indicate whether the resolutions were posted with the third display.

different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the Ten Commandments' "influence is clearly seen in the Declaration," *id.*, at 180a; in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives "from the consent of the governed," *id.*, at 190a.[21] If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.[22]

2

In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Coun-

---

[21] The Counties have now backed away from their broad assertion that the Commandments provide "the" moral background of the Declaration of Independence, and now merely claim that many of the Commandments "regarding murder, property, theft, coveting, marriage, rest from labor and honoring parents are compatible with the rights to life, liberty and happiness." Brief for Petitioners 10, n. 7.

[22] The Counties grasp at *McGowan* v. *Maryland*, 366 U. S. 420 (1961), but it bears little resemblance to this case. As noted *supra*, at 861, *McGowan* held that religious purposes behind centuries-old predecessors of Maryland's Sunday laws were not dispositive of the purposes of modern Sunday laws, where the legislature had removed much of the religious reference in the laws and stated secular and pragmatic justifications for them. 366 U. S., at 446–452. But a conclusion that centuries-old purposes may no longer be operative says nothing about the relevance of recent evidence of purpose, and this case is far more like *Santa Fe*, with its evolution of a school football game prayer policy over the course of a single lawsuit. Like that case, "[t]his [one] comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." 530 U. S., at 315 (describing the evolution of the school district's football prayer policy). Thus, as in *Santa Fe*, it makes sense to examine the Counties' latest action "in light of [their] history of" unconstitutional practices. *Id.*, at 309.

ties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions. See *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656 (2004).

Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion.[23]

IV

The importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), and a word needs to be said about the different view taken in today's dissent. We all agree, of course, on the need for some interpretative help. The First Amendment contains no textual definition of "establishment," and the

[23] The dissent notes that another depiction of Moses and the Commandments adorns this Court's east pediment. *Post*, at 906. But as with the courtroom frieze, Moses is found in the company of other figures, not only great but secular.

term is certainly not self-defining. No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation, *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), a state) church, but nothing in the text says just how much more it covers. There is no simple answer, for more than one reason.

The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

The First Amendment has not one but two clauses tied to "religion," the second forbidding any prohibition on "the free exercise thereof," and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 719 (2005). At other times, limits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). The dissent, then, is wrong to read cases like *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970), as a rejection of neutrality on its own terms, *post*, at 891–892, for tradeoffs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had.

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of indi-

viduals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, *Wallace*, 472 U. S., at 52–54, and n. 38, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists). *E. g.*, *Everson*, *supra*, at 8 ("A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]"). A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying it. To be sure, given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance, a point that has been clear from the founding era to modern times. *E. g.*, Letter from J. Madison to R. Adams (1832), in 5 The Founders' Constitution 107 (P. Kurland & R. Lerner eds. 1987) ("[In calling for separation] I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points"); *Sherbert* v. *Verner*, 374 U. S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation"). But invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important.

The dissent, however, puts forward a limitation on the application of the neutrality principle, with citations to historical evidence said to show that the Framers understood the

ban on establishment of religion as sufficiently narrow to allow the government to espouse submission to the divine will. The dissent identifies God as the God of monotheism, all of whose three principal strains (Jewish, Christian, and Muslim) acknowledge the religious importance of the Ten Commandments. *Post*, at 893–894. On the dissent's view, it apparently follows that even rigorous espousal of a common element of this common monotheism is consistent with the establishment ban.

But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban; the dissent quotes the first President as stating that "[n]ational morality [cannot] prevail in exclusion of religious principle," for example, *post*, at 887 (internal quotation marks omitted), and it cites his first Thanksgiving proclamation giving thanks to God, *post*, at 886–887. Surely if expressions like these from Washington and his contemporaries were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers' understanding of it (although there would, of course, still be the question of whether the historical case could overcome some 60 years of precedent taking neutrality as its guiding principle).[24]

---

[24] The dissent also maintains that our precedents show that a solo display of the Commandments is a mere acknowledgment of religion "on par with the inclusion of a crèche or a menorah" in a holiday display, or an official's speech or prayer, *post*, at 905. Whether or not our views would differ about the significance of those practices if we were considering them as original matters, they manifest no objective of subjecting individual lives to religious influence comparable to the apparent and openly acknowledged purpose behind posting the Commandments. Crèches placed with holiday symbols and prayers by legislators do not insistently call for religious action on the part of citizens; the history of posting the Command-

But the fact is that we do have more to go on, for there is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead "extended [the] prohibition to state support for 'religion' in general." See *Lee* v. *Weisman*, 505 U. S. 577, 614–615 (1992) (SOUTER, J., concurring) (tracing development of language).

The historical record, moreover, is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison. Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution. See Letter to S. Miller (Jan. 23, 1808), in 5 The Founders' Constitution, *supra*, at 98. And Madison, whom the dissent claims as supporting its thesis, *post*, at 888, criticized Virginia's general assessment tax not just because it required people to donate "three pence" to religion, but because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." 505 U. S., at 622 (internal quotation marks omitted); see also Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, *supra*, at 106 ("[R]eligion & Govt. will both exist in greater purity, the less they are mixed together"); Letter from J. Madison to J. Adams (Sept. 1833), in Religion and Politics in the Early Republic 120 (D. Dresibach ed. 1996) (stating that with respect to religion and government the "tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the

---

ments expressed a purpose to urge citizens to act in prescribed ways as a personal response to divine authority.

Government from interference"); *Van Orden* v. *Perry*, *ante*, at 724–725 (STEVENS, J., dissenting).[25]

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding, *post*, at 886–888, stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure, and to meet "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819).

While the dissent fails to show a consistent original understanding from which to argue that the neutrality principle should be rejected, it does manage to deliver a surprise. As mentioned, the dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. Other Members of the Court have dissented on the ground that the Establishment Clause bars nothing more than governmental preference for one religion over another, *e. g.*, *Wallace*, 472 U. S., at 98–99 (REHNQUIST, J., dissenting), but at least religion has previously been treated inclusively. Today's dissent, how-

[25] The dissent cites material suggesting that separationists like Jefferson and Madison were not absolutely consistent in abstaining from official religious acknowledgment. *Post*, at 888. But, a record of inconsistent historical practice is too weak a lever to upset decades of precedent adhering to the neutrality principle. And it is worth noting that Jefferson thought his actions were consistent with nonendorsement of religion and Madison regretted any backsliding he may have done. *Lee* v. *Weisman*, 505 U. S. 577, 622–625 (1992) (SOUTER, J., concurring). "Homer nodded." *Id.*, at 624, n. 5 (corrected in erratum at 535 U. S. II).

ever, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses. Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the Clause was "not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." R. Cord, Separation of Church and State: Historical Fact and Current Fiction 13 (1988) (emphasis deleted). The Framers would, therefore, almost certainly object to the dissent's unstated reasoning that because Christianity was a monotheistic "religion," monotheism with Mosaic antecedents should be a touchstone of establishment interpretation.[26] Even on originalist critiques of existing precedent there is, it seems, no escape from interpretative consequences that would surprise the Framers. Thus, it appears to be common ground in the interpretation of a Constitution "intended to endure for ages to come," *McCulloch* v.

---

[26] There might, indeed, even have been some reservations about monotheism as the paradigm example. It is worth noting that the canonical biography of George Washington, the dissent's primary exemplar of the monotheistic tradition, calls him a deist. J. Flexner, George Washington: Anguish and Farewell (1793–1799), p. 490 (1972) ("Washington's religious belief was that of the enlightenment: deism"). It would have been odd for the First Congress to propose an Amendment with Religion Clauses that took no account of the President's religion. As with other historical matters pertinent here, however, there are conflicting conclusions. R. Brookhiser, Founding Father: Rediscovering George Washington 146 (1996) ("Washington's God was no watchmaker"). History writ small does not give clear and certain answers to questions about the limits of "religion" or "establishment."

Maryland, *supra*, at 415, that applications unanticipated by the Framers are inevitable.

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief, which is reserved for the conscience of the individual.

V

Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join in the Court's opinion. The First Amendment expresses our Nation's fundamental commitment to religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendents of people who had come to this land precisely so that they could practice their religion freely. Together with the other First Amendment guarantees—of free speech, a free press, and the rights to assemble and petition—the Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: Free people are entitled to free

and diverse thoughts, which government ought neither to constrain nor to direct.

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that "[w]e are a religious people," *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952), has proved true. Americans attend their places of worship more often than do citizens of other developed nations, R. Fowler, A. Hertzke, & L. Olson, Religion and Politics in America 28–29 (2d ed. 1999), and describe religion as playing an especially important role in their lives, Pew Global Attitudes Project, Among Wealthy Nations . . . U. S. Stands Alone in its Embrace of Religion (Dec. 19, 2002). Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

Our guiding principle has been James Madison's—that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man." Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 184 (G. Hunt ed. 1901) (hereinafter Memorial). To that end, we have held that the guarantees of religious freedom protect citizens from religious incursions by the States as well as by the Federal Government. *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). Government may not coerce a per-

son into worshiping against her will, nor prohibit her from worshiping according to it. It may not prefer one religion over another or promote religion over nonbelief. *Everson*, *supra*, at 15–16. It may not entangle itself with religion. *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 674 (1970). And government may not, by "endorsing religion or a religious practice," "mak[e] adherence to religion relevant to a person's standing in the political community." *Wallace* v. *Jaffree*, 472 U. S. 38, 69 (1985) (O'CONNOR, J., concurring in judgment).

When we enforce these restrictions, we do so for the same reason that guided the Framers—respect for religion's special role in society. Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility of judicial intervention when government action threatens or impedes such expression. Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.

Given the history of this particular display of the Ten Commandments, the Court correctly finds an Establishment Clause violation. See *ante*, at 867–873. The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable ob-

server. See *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring).

It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment. See *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"). Nor can we accept the theory that Americans who do not accept the Commandments' validity are outside the First Amendment's protections. There is no list of approved and disapproved beliefs appended to the First Amendment—and the Amendment's broad terms ("free exercise," "establishment," "religion") do not admit of such a cramped reading. It is true that the Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. They surely could not have predicted new religions, some of them born in this country. But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point. They worried that "the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." Memorial 186. The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all.

* * *

We owe our First Amendment to a generation with a profound commitment to religion and a profound commitment to religious liberty—visionaries who held their faith "with enough confidence to believe that what should be rendered

to God does not need to be decided and collected by Caesar." *Zorach*, 343 U. S., at 324–325 (Jackson, J., dissenting). In my opinion, the display at issue was an establishment of religion in violation of our Constitution. For the reasons given above, I join in the Court's opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE KENNEDY joins as to Parts II and III, dissenting.

I would uphold McCreary County and Pulaski County, Kentucky's (hereinafter Counties) displays of the Ten Commandments. I shall discuss, first, why the Court's oft repeated assertion that the government cannot favor religious practice is false; second, why today's opinion extends the scope of that falsehood even beyond prior cases; and third, why even on the basis of the Court's false assumptions the judgment here is wrong.

I

A

On September 11, 2001, I was attending in Rome, Italy, an international conference of judges and lawyers, principally from Europe and the United States. That night and the next morning virtually all of the participants watched, in their hotel rooms, the address to the Nation by the President of the United States concerning the murderous attacks upon the Twin Towers and the Pentagon, in which thousands of Americans had been killed. The address ended, as Presidential addresses often do, with the prayer "God bless America." The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country's loss, sadly observed: "How I wish that the Head of State of my country, at a similar time of national tragedy and distress, could conclude his address 'God bless _____.' It is of course absolutely forbidden."

That is one model of the relationship between church and state—a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins, "France is [a] . . . secular . . . Republic." France Const., Art. 1, in 7 Constitutions of the Countries of the World, p. 1 (G. Flanz ed. 2000). Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America. George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words "so help me God." See Blomquist, The Presidential Oath, the American National Interest and a Call for Presiprudence, 73 UMKC L. Rev. 1, 34 (2004). The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." 1 C. Warren, The Supreme Court in United States History 469 (rev. ed. 1926) (internal quotation marks omitted). The First Congress instituted the practice of beginning its legislative sessions with a prayer. *Marsh* v. *Chambers*, 463 U. S. 783, 787–788 (1983). The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. *Id.*, at 788. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim "a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many signal favours of Almighty God." H. R. Jour., 1st Cong., 1st Sess., 123 (1826 ed.); see also Sen. Jour., 1st Sess., 88 (1820 ed.). President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789, on behalf of the American people "'to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be,'" *Van Orden* v. *Perry*, *ante*, at 687 (plurality opinion) (quoting President Washington's first Thanksgiving Proclamation), thus beginning a tradition of offering gratitude to

God that continues today. See *Wallace* v. *Jaffree*, 472 U. S. 38, 100–103 (1985) (REHNQUIST, J., dissenting).[1] The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*, at 52, n. *(a)*. And of course the First Amendment itself accords religion (and no other manner of belief) special constitutional protection.

These actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality. The "fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 213 (1963). See Underkuffler-Freund, The Separation of the Religious and the Secular: A Foundational Challenge to First-Amendment Theory, 36 Wm. & Mary L. Rev. 837, 896–918 (1995). President Washington opened his Presidency with a prayer, see Inaugural Addresses of the Presidents of the United States 1, 2 (1989), and reminded his fellow citizens at the conclusion of it that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle," Farewell Address (1796), reprinted in 35 Writings of George Washington 229 (J. Fitzpatrick ed. 1940). President John Adams wrote to the Massachusetts Militia, "we have no government

[1] See, *e. g.*, President's Thanksgiving Day 2004 Proclamation (Nov. 23, 2004), available at http://www.whitehouse.gov/news/releases/2004/11/20041123-4.html (all Internet materials as visited June 24, 2005, and available in Clerk of Court's case file).

armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter (Oct. 11, 1798), reprinted in 9 Works of John Adams 229 (C. Adams ed. 1971). Thomas Jefferson concluded his second inaugural address by inviting his audience to pray:

> "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." Inaugural Addresses of the Presidents of the United States, at 18, 22–23.

James Madison, in his first inaugural address, likewise placed his confidence "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." *Id.*, at 25, 28.

Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government,

remains commonplace. Our coinage bears the motto, "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God." As one of our Supreme Court opinions rightly observed, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952), repeated with approval in *Lynch* v. *Donnelly*, 465 U. S. 668, 675 (1984); *Marsh*, 463 U. S., at 792; *Abington Township*, *supra*, at 213.

With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that the "'First Amendment mandates governmental neutrality between . . . religion and nonreligion,'" *ante*, at 860, and that "[m]anifesting a purpose to favor . . . adherence to religion generally," *ibid.*, is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted *unanimously* by the Senate and with only five nays in the House of Representatives, see 148 Cong. Rec. 12041 (June 28, 2002); *id.*, at 19518 (Oct. 8, 2002), criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional. See Act of Nov. 13, 2002, §§ 1(9), 2(a), 3(a), 116 Stat. 2057, 2058, 2060–2061 (reaffirming the Pledge of Allegiance and the National Motto ("In God We Trust") and stating that the Pledge of Allegiance is "clearly consistent with the text and intent of the Constitution"). Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century. See *ante*, at 860, citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 335 (1987), in turn citing *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971), in

turn citing *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 243 (1968), in turn quoting *Abington Township*, 374 U. S., at 222, in turn citing *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947).[2] And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun "*Lemon* test" that embodies the supposed principle of neutrality between religion and irreligion. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–399 (1993) (SCALIA, J., concurring in judgment) (collecting criticism of *Lemon*); *Van Orden, ante*, at 692–693, 697 (THOMAS, J., concurring); *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 720 (1994) (O'CONNOR, J., concurring in part and concurring in judgment); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655–656, 672–673 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part); *Wallace*, 472 U. S., at 112 (REHNQUIST, J., dissenting); see also *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646, 671 (1980) (STEVENS, J., dissenting) (disparaging "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"). And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indis-

[2] The fountainhead of this jurisprudence, *Everson* v. *Board of Ed. of Ewing*, based its dictum that "[n]either a state nor the Federal Government . . . can pass laws which . . . aid all religions," 330 U. S., at 15, on a review of historical evidence that focused on the debate leading up to the passage of the Virginia Bill for Religious Liberty, see *id.*, at 11–13. A prominent commentator of the time remarked (after a thorough review of the evidence himself) that it appeared the Court had been "sold . . . a bill of goods." Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Prob. 3, 16 (1949).

pensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle. In a revealing footnote, *ante*, at 859–860, n. 10, the Court acknowledges that the "Establishment Clause doctrine" it purports to be applying "lacks the comfort of categorical absolutes." What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not. The footnote goes on to say that "[i]n special instances we have found good reason" to dispense with the principle, but "[n]o such reasons present themselves here." *Ibid.* It does not identify all of those "special instances," much less identify the "good reason" for their existence.

I have cataloged elsewhere the variety of circumstances in which this Court—even *after* its embrace of *Lemon*'s stated prohibition of such behavior—has approved government action "undertaken with the specific intention of improving the position of religion," *Edwards* v. *Aguillard*, 482 U. S. 578, 616 (1987) (SCALIA, J., dissenting). See *id.*, at 616–618. Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice—but we have approved it. See *Amos*, *supra*, at 338 (exemption from federal prohibition of religious discrimination by employers); *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 673 (1970) (property tax exemption for church property); *Zorach*, *supra*, at 308, 315 (law permitting students to leave public school for the purpose of

receiving religious education). Indeed, we have even approved (post-*Lemon*) government-led prayer to God. In *Marsh* v. *Chambers*, the Court upheld the Nebraska State Legislature's practice of paying a chaplain to lead it in prayer at the opening of legislative sessions. The Court explained that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U. S., at 792. (Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgment of beliefs widely held among the people of this country?)

The only "good reason" for ignoring the neutrality principle set forth in any of these cases was the antiquity of the practice at issue. See *id.*, at 786–792, 794; *Walz*, *supra*, at 676–680. That would be a good reason for finding the neutrality principle a mistaken interpretation of the Constitution, but it is hardly a good reason for letting an unconstitutional practice continue. We did not hide behind that reason in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), which found unconstitutional bicameral state legislatures of a sort that had existed since the beginning of the Republic. And almost monthly, it seems, the Court has not shrunk from invalidating aspects of criminal procedure and penology of similar vintage. See, *e. g.*, *Deck* v. *Missouri*, 544 U. S. 622, 633 (2005) (invalidating practice of shackling defendants absent "special circumstances"); *id.*, at 641–645 (THOMAS, J., dissenting); *Roper* v. *Simmons*, 543 U. S. 551, 568 (2005) (invalidating practice of executing under-18-year-old offenders); *id.*, at 611, n. 2 (SCALIA, J., dissenting). What, then, could be the genuine "good reason" for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which "has no influence over either the sword or the purse," The Federalist No. 78, p. 412 (J. Pole ed. 2005) (A. Hamilton), cannot go

too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.

Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. See *ante*, at 868; see also *Van Orden*, *ante*, at 717–718 (STEVENS, J., dissenting). That is indeed a valid principle where public aid or assistance to religion is concerned, see *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 652 (2002), or where the free exercise of religion is at issue, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532–533 (1993); *id.*, at 557–558 (SCALIA, J., concurring in part and concurring in judgment), but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational—but it was monotheistic.[3] In *Marsh* v.

[3] The Court thinks it "surpris[ing]" and "truly . . . remarkable" to believe that "the deity the Framers had in mind" (presumably in all the instances of invocation of the deity I have cited) "was the God of monothe-

Chambers, supra, we said that the fact the particular prayers offered in the Nebraska Legislature were "in the Judeo-Christian tradition," *id.*, at 793, posed no additional problem, because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief," *id.*, at 794–795.

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh* v. *Chambers* put it, "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792. The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. See U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2004–2005, p. 55 (124th ed. 2004) (Table No. 67). All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. See 13 Encyclopedia of Religion 9074 (2d ed. 2005); The Qur'an 104 (M. Haleem transl. 2004). Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.[4]

---

ism." *Ante*, at 879. This reaction would be more comprehensible if the Court could suggest what other God (in the singular, and with a capital G) there *is*, other than "the God of monotheism." This is not *necessarily* the Christian God (though if it were, one would expect Christ regularly to be invoked, which He is not); but it is *inescapably* the God of monotheism.

[4] This is not to say that a display of the Ten Commandments could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative. Here the display of the Ten Commandments alongside eight secular documents,

B

A few remarks are necessary in response to the criticism of this dissent by the Court, as well as JUSTICE STEVENS' criticism in the related case of *Van Orden* v. *Perry*, *ante*, p. 707. JUSTICE STEVENS' writing is largely devoted to an attack upon a straw man. "[R]eliance on early religious proclamations and statements made by the Founders is . . . problematic," he says, "because those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution's text." *Van Orden*, *ante*, at 724 (dissenting opinion) (footnote omitted). But I have not relied upon (as he and the Court in this case do) mere "proclamations and statements" of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government, including the First Congress's beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Territory Ordinance; our first President's issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court. The only mere "proclamations and statements" of the Founders I have relied upon were statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity—Washington's prayer at the opening of his Presidency and his Farewell Address, President John Adams' letter to the Massachusetts Militia, and Jefferson's and Madison's inaugural addresses. The Court and JUSTICE STEVENS, by contrast, appeal to no official or even quasi-official action in support of their view of the Establishment Clause—only James Madison's Memorial and Remonstrance Against Religious Assessments, written before the Federal Constitution had even been proposed,

---

and the plaque's explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute.

two letters written by Madison long after he was President, and the quasi-official *inaction* of Thomas Jefferson in refusing to issue a Thanksgiving Proclamation. See *ante*, at 878–879; *Van Orden*, *ante*, at 724–725 (STEVENS, J., dissenting). The Madison Memorial and Remonstrance, dealing as it does with enforced contribution to religion rather than public acknowledgment of God, is irrelevant; one of the letters is utterly ambiguous as to the point at issue here, and should not be read to contradict Madison's statements in his first inaugural address, quoted earlier; even the other letter does not disapprove public acknowledgment of God, unless one posits (what Madison's own actions as President would contradict) that reference to God contradicts "the equality of *all* religious sects." See Letter from James Madison to Edward Livingston (July 10, 1822), in 5 The Founders' Constitution 105–106 (P. Kurland & R. Lerner eds. 1987). And as to Jefferson: The notoriously self-contradicting Jefferson did not choose to have his nonauthorship of a Thanksgiving Proclamation inscribed on his tombstone. What he did have inscribed was his authorship of the Virginia Statute for Religious Freedom, a governmental act which begins "Whereas, Almighty God hath created the mind free . . . ." Va. Code Ann. § 57–1 (Lexis 2003).

It is no answer for JUSTICE STEVENS to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." *Van Orden*, *ante*, at 724 (dissenting opinion). The Establishment Clause, upon which JUSTICE STEVENS would rely, *was* enshrined in the Constitution's text, and these official actions show *what it meant*. There were doubtless some who thought it should have a broader meaning, but those views were plainly rejected. JUSTICE STEVENS says that reliance on these actions is "bound to paint a misleading picture," *ibid.*, but it is hard to see why. What is more probative of the meaning of the Establishment Clause than the actions of

the very Congress that proposed it, and of the first President charged with observing it?

JUSTICE STEVENS also appeals to the undoubted fact that some in the founding generation thought that the Religion Clauses of the First Amendment should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism. See *Van Orden*, *ante*, at 725–728. I am at a loss to see how this helps his case, except by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, he proposes that it be construed not to permit any government invocation of religion at all.) At any rate, those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones. Washington's First Thanksgiving Proclamation is merely an example. *All* of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history,[5] and *all* the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ.[6] Rather than relying

---

[5] The two exceptions are the March 23, 1798, proclamation of John Adams, which asks God "freely to remit all our offenses" "through the Redeemer of the World," http://www.pilgrimhall.org/ThanxProc1789.htm, and the November 17, 1972, proclamation of Richard Nixon, which stated, "From Moses at the Red Sea to Jesus preparing to feed the multitudes, the Scriptures summon us to words and deeds of gratitude, even before divine blessings are fully perceived," Presidential Proclamation No. 4170, 37 Fed. Reg. 24647 (1972).

[6] JUSTICE STEVENS finds that Presidential inaugural and farewell speeches (which are the only speeches upon which I have relied) do not violate the Establishment Clause only because everyone knows that they express the personal religious views of the speaker, and not government policy. See *Van Orden* v. *Perry*, *ante*, at 723 (dissenting opinion). This is a peculiar stance for one who has voted that a student-led invocation at a high school football game and a rabbi-led invocation at a high school graduation *did* constitute the sort of governmental endorsement of religion that the Establishment Clause forbids. See *Santa Fe Independent*

upon JUSTICE STEVENS' assurance that "[t]he original understanding of the type of 'religion' that qualified for constitutional protection under the Establishment Clause likely did not include . . . followers of Judaism and Islam," *Van Orden*, *ante*, at 728; see also *ante*, at 880, I would prefer to take the word of George Washington, who, in his famous Letter to the Hebrew Congregation of Newport, Rhode Island, wrote:

> "All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." 6 The Papers of George Washington, Presidential Series 285 (D. Twohig ed. 1996).

The letter concluded, by the way, with an invocation of the one God:

> "May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy." *Ibid.*

JUSTICE STEVENS says that if one is serious about following the original understanding of the Establishment Clause, he must repudiate its incorporation into the Fourteenth Amendment, and hold that it does not apply against the States. See *Van Orden*, *ante*, at 729–731 (dissenting opinion). This is more smoke. JUSTICE STEVENS did not feel that way last Term, when he joined an opinion insisting upon the original meaning of the Confrontation Clause, but nonetheless applying it against the State of Washington. See *Crawford* v. *Washington*, 541 U. S. 36 (2004). The notion that incorporation empties the incorporated provisions of their original meaning has no support in either reason or precedent.

School Dist. v. *Doe*, 530 U. S. 290 (2000); *Lee* v. *Weisman*, 505 U. S. 577 (1992).

JUSTICE STEVENS argues that original meaning should not be the touchstone anyway, but that we should rather "expoun[d] the meaning of constitutional provisions with one eye toward our Nation's history and the other fixed on its democratic aspirations." *Van Orden*, *ante*, at 732 (dissenting opinion). This is not the place to debate the merits of the "living Constitution," though I must observe that JUSTICE STEVENS' quotation from *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819), refutes rather than supports that approach.[7] Even assuming, however, that the meaning of the Constitution ought to change according to "democratic aspirations," why are those aspirations to be found in Justices' notions of what the Establishment Clause ought to mean, rather than in the democratically adopted dispositions of our current society? As I have observed above, numerous provisions of our laws and numerous continuing practices of our people demonstrate that the government's invocation of God (and hence the government's invocation of the Ten Commandments) is unobjectionable—including a statute enacted by Congress almost unanimously less than three years ago, stating that "under God" in the Pledge of Allegiance is constitutional, see 116 Stat. 2058. To ignore all this is not to give effect to "democratic aspirations" but to frustrate them.

Finally, I must respond to JUSTICE STEVENS' assertion that I would "marginaliz[e] the belief systems of more than 7 million Americans" who adhere to religions that are not monotheistic. *Van Orden*, *ante*, at 719, n. 18 (dissenting opinion). Surely that is a gross exaggeration. The beliefs of those citizens are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator. Invocation of God despite their beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the Religion Clauses of the First

[7] See Scalia, Originalism: The Lesser Evil, 57 Cincinnati L. Rev. 849, 852–853 (1989).

Amendment, but because governmental invocation of God is not an establishment. JUSTICE STEVENS fails to recognize that in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.[8] It is not for this Court to change a disposition that accounts, many Americans think, for the phenomenon remarked upon in a quotation attributed to various authors, including Bismarck, but which I prefer to associate with Charles de Gaulle: "God watches over little children, drunkards, and the United States of America."

II

As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion. First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an "'objective observer.'" *Ante*, at 862. Because in the Court's view the true danger to be guarded against is that the objective observer would feel like an "'outside[r]'" or "'not [a] full membe[r] of the political community,'" its inquiry focuses not on

---

[8] Nothing so clearly demonstrates the utter inconsistency of our Establishment Clause jurisprudence as JUSTICE O'CONNOR's stirring concurrence in the present case. "[W]e do not," she says, "count heads before enforcing the First Amendment." *Ante*, at 884. But JUSTICE O'CONNOR joined the opinion of the Court in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), which held legislative prayer to be "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792.

the *actual purpose* of government action, but the "purpose apparent from government action." *Ante*, at 860. Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise. See *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 776–777 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) (stating that "when the reasonable observer would view a government practice as endorsing religion, . . . it is our *duty* to hold the practice invalid," even if the law at issue was neutral and the benefit conferred on the religious entity was incidental).

I have remarked before that it is an odd jurisprudence that bases the unconstitutionality of a government practice that does not *actually* advance religion on the hopes of the government that it *would* do so. See *Edwards*, 482 U. S., at 639. But that oddity pales in comparison to the one invited by today's analysis: the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion.

Second, the Court replaces *Lemon*'s requirement that the government have "*a* secular . . . purpose," 403 U. S., at 612 (emphasis added), with the heightened requirement that the secular purpose "predominate" over any purpose to advance religion. *Ante*, at 864–865. The Court treats this extension as a natural outgrowth of the longstanding requirement that the government's secular purpose not be a sham, but simple logic shows the two to be unrelated. If the government's proffered secular purpose is not genuine, then the government has no secular purpose at all. The new demand that secular purpose predominate contradicts *Lemon*'s more limited requirement, and finds no support in our cases. In all but one of the five cases in which this Court has invalidated a government practice on the basis of its purpose to

benefit religion, it has first declared that the statute was motivated entirely by the desire to advance religion. See *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 308–309 (2000) (dismissing the school district's proffered secular purposes as shams); *Wallace*, 472 U. S., at 56 (finding "*no* secular purpose" (emphasis in original)); *Stone* v. *Graham*, 449 U. S. 39, 41 (1980) *(per curiam)* (finding that "Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has *no secular legislative purpose*" (emphasis added)); *Epperson* v. *Arkansas*, 393 U. S. 97, 107–109 (1968). In *Edwards, supra*, the Court did say that the state action was invalid because its "primary" or "preeminent" purpose was to advance a particular religious belief, 482 U. S., at 590, 593, 594, but that statement was unnecessary to the result, since the Court rejected the State's only proffered secular purpose as a sham. See *id.*, at 589.

I have urged that *Lemon*'s purpose prong be abandoned, because (as I have discussed in Part I) even an *exclusive* purpose to foster or assist religious practice is not necessarily invalidating. But today's extension makes things even worse. By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record.[9] Those responsible for the

---

[9] The Court's reflexive skepticism of the government's asserted secular purposes is flatly inconsistent with the deferential approach taken by our previous Establishment Clause cases. We have repeated many times that, where a court undertakes the sensitive task of reviewing a government's asserted purpose, it must take the government at its word absent compelling evidence to the contrary. See, *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578, 586 (1987) (stating that "the Court is . . . deferential to a State's articulation of a secular purpose," unless that purpose is insincere or a sham); *Mueller* v. *Allen*, 463 U. S. 388, 394–395 (1983) (ascribing the Court's disinclination to invalidate government practices under *Lemon*'s purpose prong to its "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's

adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

III

Even accepting the Court's *Lemon*-based premises, the displays at issue here were constitutional.

A

To any person who happened to walk down the hallway of the McCreary or Pulaski County Courthouse during the roughly nine months when the Foundations Displays were exhibited, the displays must have seemed unremarkable—if indeed they were noticed at all. The walls of both courthouses were already lined with historical documents and other assorted portraits; each Foundations Display was exhibited in the same format as these other displays and nothing in the record suggests that either County took steps to give it greater prominence.

Entitled "The Foundations of American Law and Government Display," each display consisted of nine equally sized documents: the original version of the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star Spangled Banner, the Mayflower Compact of 1620, a picture of Lady Justice, the National Motto of the United States ("In God We Trust"), the Preamble to the Kentucky Constitution, and the Ten Commandments. The displays did not emphasize any of the nine documents in any way: The frame holding the Ten Commandments was of the same size and had the

---

program may be discerned from the face of the statute"); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 74 (1985) (O'CONNOR, J., concurring in judgment) ("[T]he inquiry into the purpose of the legislature . . . should be deferential and limited").

same appearance as that which held each of the other documents. See 354 F. 3d 438, 443 (CA6 2003).

Posted with the documents was a plaque, identifying the display, and explaining that it "'contains documents that played a significant role in the foundation of our system of law and government.'" *Ibid.* The explanation related to the Ten Commandments was third in the list of nine and did not serve to distinguish it from the other documents. It stated:

> "'The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.'" *Ibid.*

B

On its face, the Foundations Displays manifested the purely secular purpose that the Counties asserted before the District Court: "to display documents that played a significant role in the foundation of our system of law and government." Affidavit of Judge Jimmie Green in Support of Defendants' Opposition to Plaintiffs' Motion for Contempt or, in the Alternative, for Supplemental Preliminary Injunction in Civ. Action No. 99–507 (ED Ky.), p. 2, ¶4, App. 57. That the displays included the Ten Commandments did not transform their apparent secular purpose into one of impermissible advocacy for Judeo-Christian beliefs. Even an isolated display of the Decalogue conveys, at worst, "an equivocal message, perhaps of respect for Judaism, for religion in general, or for law." *Allegheny County*, 492 U. S., at 652 (STEVENS, J.,

concurring in part and dissenting in part). But when the Ten Commandments appear alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system. See *id.*, at 652–653. This is doubly true when the display is introduced by a document that informs passersby that it "'contains documents that played a significant role in the foundation of our system of law and government.'" 354 F. 3d, at 443.

The same result follows if the Ten Commandments display is viewed in light of the government practices that this Court has countenanced in the past. The acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage is surely no more of a step toward establishment of religion than was the practice of legislative prayer we approved in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), and it seems to be on par with the inclusion of a crèche or a menorah in a "Holiday" display that incorporates other secular symbols, see *Lynch* v. *Donnelly*, 465 U. S., at 679–680; *Allegheny County*, *supra*, at 621 (Blackmun, J., concurring in part and dissenting in part). The parallels between this case and *Marsh* and *Lynch* are sufficiently compelling that they ought to decide this case, even under the Court's misguided Establishment Clause jurisprudence.[10]

[10] The Court's only response is that the inclusion of the Ten Commandments in a display about the foundations of American law reflects "a purpose to [call on] citizens to act in prescribed ways as a personal response to divine authority," in a way that legislative prayer and the inclusion of a crèche in a holiday display do not. See *ante*, at 878, n. 24. That might be true if the Commandments were displayed by themselves in a church, or even in someone's home. It seems to me patently untrue—given the Decalogue's "undeniable historical meaning" as a symbol of the religious foundations of law, see *Van Orden*, *ante*, at 690 (plurality opin-

Acknowledgment of the contribution that religion has made to our Nation's legal and governmental heritage partakes of a centuries-old tradition. Members of this Court have themselves often detailed the degree to which religious belief pervaded the National Government during the founding era. See *Lynch*, *supra*, at 674–678; *Marsh*, *supra*, at 786–788; *Lee* v. *Weisman*, 505 U. S. 577, 633–636 (1992) (SCALIA, J., dissenting); *Wallace*, 472 U. S., at 100–106 (REHNQUIST, J., dissenting); *Engel* v. *Vitale*, 370 U. S. 421, 446–450, and n. 3 (1962) (Stewart, J., dissenting). Display of the Ten Commandments is well within the mainstream of this practice of acknowledgment. Federal, state, and local governments across the Nation have engaged in such display.[11] The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment of the building, and symbols of the Ten Commandments "adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom." *Van Orden*, *ante*, at 688 (plurality opinion). Similar depictions of the Decalogue appear

---

ion)—when they are posted in a courthouse display of historical documents. The observer would no more think himself "called upon to act" in conformance with the Commandments than he would think himself called upon to think and act like William Bradford because of the courthouse posting of the Mayflower Compact—especially when he is *told* that the exhibit consists of documents that contributed to American law and government.

[11] The significant number of cases involving Ten Commandments displays in the last two years suggests the breadth of their appearance. See, *e. g.*, *Books* v. *Elkhart County*, 401 F. 3d 857, 858–859 (CA7 2005) (Ten Commandments included in a display identical to the Foundations Display); *Mercier* v. *Fraternal Order of Eagles*, 395 F. 3d 693, 696 (CA7 2005) (Ten Commandments monument in city park since 1965); *Modrovich* v. *Allegheny County*, 385 F. 3d 397, 399 (CA3 2004) (Ten Commandments plaque, donated in 1918, on wall of Allegheny County Courthouse); *Freethought Soc. of Greater Philadelphia* v. *Chester County*, 334 F. 3d 247, 249 (CA3 2003) (Ten Commandments plaque, donated in 1920, on wall of Chester County Courthouse); *King* v. *Richmond County*, 331 F. 3d 1271, 1273–1274 (CA11 2003) (Ten Commandments depicted in county seal since 1872).

on public buildings and monuments throughout our Nation's Capital. *Ante*, at 689. The frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.

Perhaps in recognition of the centrality of the Ten Commandments as a widely recognized symbol of religion in public life, the Court is at pains to dispel the impression that its decision will require governments across the country to sandblast the Ten Commandments from the public square. See *ante*, at 874. The constitutional problem, the Court says, is with the Counties' *purpose* in erecting the Foundations Displays, not the displays themselves. The Court adds in a footnote: "One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Ante*, at 866, n. 14.

This inconsistency may be explicable in theory, but I suspect that the "objective observer" with whom the Court is so concerned will recognize its absurdity in practice. By virtue of details familiar only to the parties to litigation and their lawyers, McCreary and Pulaski Counties, Kentucky, and Rutherford County, Tennessee, have been ordered to remove the same display that appears in courthouses from Mercer County, Kentucky, to Elkhart County, Indiana. Compare *American Civil Liberties Union of Tenn.* v. *Rutherford County*, 209 F. Supp. 2d 799, 808–809 (MD Tenn. 2002) (holding Foundations Display to be unconstitutional based on prior actions of county commission), with *Books* v. *Elkhart County*, 401 F. 3d 857, 869 (CA7 2005) (sustaining Foundations Display as "secular . . . in its purpose and effect"); *American Civil Liberties Union of Ky.* v. *Mercer County*, 219 F. Supp. 2d 777, 787–789 (ED Ky. 2002) (rejecting Establishment Clause challenge to an identical Foundations Display and distinguishing *McCreary County* on the ground

that the County's purpose had not been "tainted with any prior history"). Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation.

C

In any event, the Court's conclusion that the Counties exhibited the Foundations Displays with the purpose of promoting religion is doubtful. In the Court's view, the impermissible motive was apparent from the initial displays of the Ten Commandments all by themselves: When that occurs, the Court says, "a religious object is unmistakable." *Ante*, at 869. Surely that cannot be. If, as discussed above, the Commandments have a proper place in our civic history, even placing them by themselves can be civically motivated—especially when they are placed, not in a school (as they were in the *Stone* case upon which the Court places such reliance), but in a courthouse. Cf. *Van Orden*, *ante*, at 701 (BREYER, J., concurring in judgment) ("The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the . . . nonreligious aspects of the tablets' message to predominate"). And the fact that at the posting of the exhibit a clergyman was present is unremarkable (clergymen taking particular pride in the role of the Ten Commandments in our civic history); and even more unremarkable the fact that the clergyman "testified to the certainty of the existence of God," *ante*, at 869.

The Court has in the past prohibited government actions that "proselytize or advance any one, or . . . disparage any other, faith or belief," *Marsh*, 463 U. S., at 794–795, or that apply some level of coercion (though I and others have dis-

agreed about the form that coercion must take), see, *e. g.*, *Lee* v. *Weisman*, 505 U. S., at 592 (prayer at high-school graduation invalid because of "subtle coercive pressure"); *id.*, at 642 (SCALIA, J., dissenting). The passive display of the Ten Commandments, even standing alone, does not begin to do either. What JUSTICE KENNEDY said of the crèche in *Allegheny County* is equally true of the Counties' original Ten Commandments displays:

> "No one was compelled to observe or participate in any religious ceremony or activity. [T]he count[ies] [did not] contribut[e] significant amounts of tax money to serve the cause of one religious faith. [The Ten Commandments] are purely passive symbols of [the religious foundation for many of our laws and governmental institutions]. Passersby who disagree with the message conveyed by th[e] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." 492 U. S., at 664 (opinion concurring in judgment in part and dissenting in part).

Nor is it the case that a solo display of the Ten Commandments advances any one faith. They are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given. See 13 Encyclopedia of Religion 9074 (2d ed. 2005).[12]

---

[12] Because there are interpretational differences between faiths and within faiths concerning the meaning and perhaps even the text of the Commandments, JUSTICE STEVENS maintains that *any* display of the text of the Ten Commandments is impermissible because it "invariably places the [government] at the center of a serious sectarian dispute." *Van Orden*, *ante*, at 718–719 (dissenting opinion). I think not. The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not). In any event, the context

The Court also points to the Counties' second displays, which featured a number of statements in historical documents reflecting a religious influence, and the resolutions that accompanied their erection, as evidence of an impermissible religious purpose.[13] In the Court's view, "[t]he [second] display's unstinting focus . . . on religious passages, show[s] that the Counties were posting the Commandments precisely because of their sectarian content." *Ante*, at 870. No, all it necessarily shows is that the exhibit was meant to focus upon the historic role of religious belief in our national life—which is entirely permissible. And the same can be said of the resolution. To forbid any government focus upon this aspect of our history is to display what Justice Goldberg called "untutored devotion to the concept of neutrality," *Abington Township*, 374 U. S., at 306 (concurring opinion), that would commit the Court (and the Nation) to a revisionist agenda of secularization.

---

of the display here could not conceivably cause the viewer to believe that the government was taking sides in a doctrinal controversy.

[13] Posted less than a month after respondents filed suit, the second displays included an excerpt from the Declaration of Independence, the Preamble to the Kentucky Constitution, a page from the Congressional Record declaring 1983 to be the Year of the Bible and the proclamation of President Reagan stating the same, a proclamation of President Lincoln designating April 30, 1863, as a National Day of Prayer and Humiliation, an excerpt from Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" stating that "[t]he Bible is the best gift God has ever given to man," and the Mayflower Compact. 96 F. Supp. 2d 679, 684 (ED Ky. 2000) (internal quotation marks omitted). The Counties erected the displays in accordance with a resolution passed by their legislative bodies, authorizing the County-Judge Executives "to read or post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded," and to display alongside the Ten Commandments copies of the documents listed above "without censorship because of any Christian or religious references in these writings, documents, and historical records." Def. Exh. 1 in Memorandum in Support of Defendants' Motion to Dismiss in Civ. Action No. 99–507, p. 1 (ED Ky.) (hereinafter Def. Exh. 1).

Turning at last to the displays actually at issue in this case, the Court faults the Counties for not *repealing* the resolution expressing what the Court believes to be an impermissible intent. Under these circumstances, the Court says, "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *Ante*, at 872. Even were I to accept all that the Court has said before, I would not agree with that assessment. To begin with, of course, it is unlikely that a reasonable observer *would even have been aware* of the resolutions, so there would be nothing to "cast off." The Court implies that the Counties may have been able to remedy the "taint" from the old resolutions by enacting a new one. See *ante*, at 871–872. But that action would have been wholly unnecessary in light of the explanation that the Counties included *with the displays themselves:* A plaque next to the documents informed all who passed by that each display "contains documents that played a significant role in the foundation of our system of law and government." Additionally, there was no reason for the Counties to repeal or repudiate the resolutions adopted with the hanging of the second displays, since they related *only to the second displays.* After complying with the District Court's order to remove the second displays "immediately," and erecting new displays that in content and by express assertion reflected a *different* purpose from that identified in the resolutions, the Counties had no reason to believe that their previous resolutions would be deemed to be the basis for their actions.[14] After the Coun-

[14] Contrary to the Court's suggestion, see *ante*, at 872, n. 20, it is clear that the resolutions were closely tied to the second displays, but not to the third. Each of the documents included in the second displays was authorized by the resolutions, and those displays, consistent with the resolutions' direction to "post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded," Def. Exh. 1, *supra*, n. 13, at 1, consisted of a large copy of the Ten Commandments alongside much smaller framed copies of other historical, religious documents. The third displays, in contrast,

ties discovered that the sentiments expressed in the resolutions could be attributed to their most recent displays (in oral argument before this Court), they repudiated them immediately.

In sum: The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third. Given the presumption of regularity that always accompanies our review of official action, see n. 9, *supra*, the Court has identified no evidence of a purpose to advance religion in a way that is inconsistent with our cases. The Court may well be correct in identifying the third displays as the fruit of a desire to display the Ten Commandments, *ante*, at 872, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous.

* * *

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

---

included documents not mentioned in the resolutions (the Magna Carta and a picture of Lady Justice) and did not include documents authorized by the resolutions (correspondence and proclamations of Abraham Lincoln and the Resolution of Congress declaring 1983 to be the Year of the Bible).

The resolutions also provided that they were to be posted beside the displays that they authorized. *Id.*, at 9. Yet respondents have never suggested the resolutions were posted next to the third displays, and the record before the Court indicates that they were not. The photos included in the Appendix show that the third displays included 10 frames—the nine historical documents and the prefatory statement explaining the relevance of each of the documents. See App. to Pet. for Cert. 177a (McCreary County), 178a (Pulaski County).

Syllabus

METRO-GOLDWYN-MAYER STUDIOS INC. ET AL. *v.* GROKSTER, LTD., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–480. Argued March 29, 2005—Decided June 27, 2005

Respondent companies distribute free software that allows computer users to share electronic files through peer-to-peer networks, so called because the computers communicate directly with each other, not through central servers. Although such networks can be used to share any type of digital file, recipients of respondents' software have mostly used them to share copyrighted music and video files without authorization. Seeking damages and an injunction, a group of movie studios and other copyright holders (hereinafter MGM) sued respondents for their users' copyright infringements, alleging that respondents knowingly and intentionally distributed their software to enable users to infringe copyrighted works in violation of the Copyright Act.

Discovery revealed that billions of files are shared across peer-to-peer networks each month. Respondents are aware that users employ their software primarily to download copyrighted files, although the decentralized networks do not reveal which files are copied, and when. Respondents have sometimes learned about the infringement directly when users have e-mailed questions regarding copyrighted works, and respondents have replied with guidance. Respondents are not merely passive recipients of information about infringement. The record is replete with evidence that when they began to distribute their free software, each of them clearly voiced the objective that recipients use the software to download copyrighted works and took active steps to encourage infringement. After the notorious file-sharing service, Napster, was sued by copyright holders for facilitating copyright infringement, both respondents promoted and marketed themselves as Napster alternatives. They receive no revenue from users, but, instead, generate income by selling advertising space, then streaming the advertising to their users. As the number of users increases, advertising opportunities are worth more. There is no evidence that either respondent made an effort to filter copyrighted material from users' downloads or otherwise to impede the sharing of copyrighted files.

While acknowledging that respondents' users had directly infringed MGM's copyrights, the District Court nonetheless granted respondents summary judgment as to liability arising from distribution of their soft-

ware. The Ninth Circuit affirmed. It read *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, as holding that the distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. Because the appeals court found respondents' software to be capable of substantial noninfringing uses and because respondents had no actual knowledge of infringement owing to the software's decentralized architecture, the court held that they were not liable. It also held that they did not materially contribute to their users' infringement because the users themselves searched for, retrieved, and stored the infringing files, with no involvement by respondents beyond providing the software in the first place. Finally, the court held that respondents could not be held liable under a vicarious infringement theory because they did not monitor or control the software's use, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement.

Held: One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses. Pp. 928–941.

(a) The tension between the competing values of supporting creativity through copyright protection and promoting technological innovation by limiting infringement liability is the subject of this case. Despite offsetting considerations, the argument for imposing indirect liability here is powerful, given the number of infringing downloads that occur daily using respondents' software. When a widely shared product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, so that the only practical alternative is to go against the device's distributor for secondary liability on a theory of contributory or vicarious infringement. One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it. Although "[t]he Copyright Act does not expressly render anyone liable for [another's] infringement," *Sony*, 464 U. S., at 434, these secondary liability doctrines emerged from common law principles and are well established in the law, *e. g.*, *id.*, at 486. Pp. 928–931.

(b) *Sony* addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There,

copyright holders sued Sony, the manufacturer of videocassette recorders, claiming that it was contributorily liable for the infringement that occurred when VCR owners taped copyrighted programs. The evidence showed that the VCR's principal use was "time-shifting," *i. e.*, taping a program for later viewing at a more convenient time, which the Court found to be a fair, noninfringing use. 464 U. S., at 423–424. Moreover, there was no evidence that Sony had desired to bring about taping in violation of copyright or taken active steps to increase its profits from unlawful taping. *Id.*, at 438. On those facts, the only conceivable basis for liability was on a theory of contributory infringement through distribution of a product. *Id.*, at 439. Because the VCR was "capable of commercially significant noninfringing uses," the Court held that Sony was not liable. *Id.*, at 442. This theory reflected patent law's traditional staple article of commerce doctrine that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. 35 U. S. C. §271(c). The doctrine absolves the equivocal conduct of selling an item with lawful and unlawful uses and limits liability to instances of more acute fault. In this case, the Ninth Circuit misread *Sony* to mean that when a product is capable of substantial lawful use, the producer cannot be held contributorily liable for third parties' infringing use of it, even when an actual purpose to cause infringing use is shown, unless the distributors had specific knowledge of infringement at a time when they contributed to the infringement and failed to act upon that information. *Sony* did not displace other secondary liability theories. Pp. 931–934.

(c) Nothing in *Sony* requires courts to ignore evidence of intent to promote infringement if such evidence exists. It was never meant to foreclose rules of fault-based liability derived from the common law. 464 U. S., at 439. Where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*'s staple-article rule will not preclude liability. At common law a copyright or patent defendant who "not only expected but invoked [infringing use] by advertisement" was liable for infringement. *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 62–63. The rule on inducement of infringement as developed in the early cases is no different today. Evidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use, shows an affirmative intent that the product be used to infringe, and overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use. A rule that premises liability on purposeful, culpable expression and conduct

does nothing to compromise legitimate commerce or discourage innovation having a lawful promise. Pp. 934–937.

(d) On the record presented, respondents' unlawful objective is unmistakable. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM argues persuasively that such a message is shown here. Three features of the evidence of intent are particularly notable. First, each of the respondents showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. Respondents' efforts to supply services to former Napster users indicate a principal, if not exclusive, intent to bring about infringement. Second, neither respondent attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated that failure as irrelevant because respondents lacked an independent duty to monitor their users' activity, this evidence underscores their intentional facilitation of their users' infringement. Third, respondents make money by selling advertising space, then by directing ads to the screens of computers employing their software. The more their software is used, the more ads are sent out and the greater the advertising revenue. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing. This evidence alone would not justify an inference of unlawful intent, but its import is clear in the entire record's context. Pp. 937–940.

(e) In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory requires evidence of actual infringement by recipients of the device, the software in this case. There is evidence of such infringement on a gigantic scale. Because substantial evidence supports MGM on all elements, summary judgment for respondents was error. On remand, reconsideration of MGM's summary judgment motion will be in order. Pp. 940–941.

380 F. 3d 1154, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 942. BREYER, J., filed a concurring opinion, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 949.

Donald B. Verrilli, Jr., argued the cause for petitioners. With him on the briefs for the motion picture studio and recording company petitioners were *Ian Heath Gershengorn*,

Counsel

William M. Hohengarten, Steven B. Fabrizio, Thomas J. Perrelli, Matthew J. Oppenheim, David E. Kendall, Thomas G. Hentoff, Kenneth W. Starr, Russell J. Frackman, George M. Borkowski, Robert M. Schwartz, Gregory P. Goeckner, Dean C. Garfield, Elaine J. Goldenberg, Matthew Hersh, Steven M. Marks, and *Stanley Pierre-Louis. Carey R. Ramos, Peter L. Felcher, Aidan Synnott, Theodore K. Cheng, Kelli L. Sager, Andrew J. Thomas, Jeffrey H. Blum,* and *Jeffrey L. Fisher* filed briefs for the songwriter and music publisher petitioners.

Acting Solicitor General Clement argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Keisler, Deputy Solicitor General Hungar, Douglas H. Hallward-Driemeier, Anthony A. Yang, David O. Carson,* and *John M. Whealan.*

Richard G. Taranto argued the cause for respondents. With him on the brief were *H. Bartow Farr III, Cindy A. Cohn, Fred Von Lohmann, Michael H. Page, Mark A. Lemley, Charles S. Baker,* and *Matthew A. Neco.**

---

*Briefs of *amici curiae* urging reversal were filed for the State of Utah et al. by *Mark Shurtleff,* Attorney General of Utah, and by the Attorneys General for their respective jurisdictions as follows: *Troy King* of Alabama, *Gregg Renkes* of Alaska, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Thurbert E. Baker* of Georgia, *Douglas B. Moylan* of Guam, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.,* of Louisiana, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Peter C. Harvey* of New Jersey, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *William H. Sorrell* of Vermont, *Jerry Kilgore* of Virginia,

JUSTICE SOUTER delivered the opinion of the Court.

The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable

---

Darrell V. McGraw, Jr., of West Virginia, and *Peg Lautenschlager* of Wisconsin; for the American Federation of Musicians of the United States and Canada et al. by *George H. Cohen, Patricia Polach*, and *Laurence Gold;* for the American Society of Composers, Authors and Publishers et al. by *I. Fred Koenigsberg, Michael E. Salzman*, and *Marvin L. Berenson;* for Americans for Tax Reform by *Carter G. Phillips, Alan Charles Raul, Jay T. Jorgensen*, and *Eric A. Shumsky;* for the Commissioner of Baseball et al. by *Robert Alan Garrett* and *Hadrian R. Katz;* for Defenders of Property Rights by *Theodore B. Olson, Thomas H. Dupree, Jr., Matthew D. McGill, Nancie G. Marzulla*, and *Roger Marzulla;* for International Rights Owners by *Christopher Wolf;* for Kids First Coalition et al. by *Viet D. Dinh;* for Law Professors et al. by *James Gibson;* for Macrovision Corp. by *Geoffrey L. Beauchamp, Kelly G. Huller*, and *James H. Salter;* for Napster, LLC, et al. by *Barry I. Slotnick;* for the National Academy of Recording Arts & Sciences, Inc., et al. by *Jon A. Baumgarten* and *Jay L. Cooper;* for the National Association of Broadcasters by *Marsha J. MacBride, Jane E. Mago, Benjamin F. P. Ivins*, and *Jerianne Timmerman;* for the National Association of Recording Merchandisers by *Alan R. Malasky* and *Melanie Martin-Jones;* for the Progress & Freedom Foundation by *James V. DeLong;* for the Video Software Dealers Association by *John T. Mitchell;* and for Professor Peter S. Menell et al. by *Mr. Menell, pro se.*

Briefs of *amici curiae* urging affirmance were filed for Altnet, Inc., by *Roderick G. Dorman;* for the American Civil Liberties Union et al. by *Christopher A. Hansen, Steven R. Shapiro, Sharon M. McGowan, Ann Brick*, and *Jordan C. Budd;* for the American Conservative Union et al. by *David Post;* for the Cellular Telecommunications & Internet Association et al. by *Andrew G. McBride, Joshua S. Turner, Michael Altschul, James W. Olson, Frank L. Politano, Laura Kaster, Jeffrey A. Rackow, Grier C. Raclin, Michael Standard, John Thorne, Sarah B. Deutsch*, and *Paul J. Larkin, Jr.;* for the Consumer Electronics Association et al. by *Bruce G. Joseph* and *Scott E. Bain;* for the Consumer Federation of America et al. by *Peter Jaszi;* for the Distributed Computing Industry Association by *Mr. Dorman;* for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly* and *Karen B. Tripp;* for the Free Software Foundation et al. by *Eben Moglen;* for Intel Corp. by *James M. Burger* and *Jonathan D. Hart;* for Internet Law Faculty by *William W. Fisher III* and *Jonathan Zittrain;* for Law Professors by *J. Glynn Lunney, Jr.;* for the National Association of Shareholder and Consumer Attor-

for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

I

A

Respondents, Grokster, Ltd., and StreamCast Networks, Inc., defendants in the trial court, distribute free software products that allow computer users to share electronic files through peer-to-peer networks, so called because users' computers communicate directly with each other, not through

---

neys by *Kevin P. Roddy* and *Matthew E. Van Tine;* for Sixty Intellectual Property and Technology Law Professors et al. by *Deirdre K. Mulligan* and *Pamela Samuelson;* for Sovereign Artists et al. by *James R. Wheaton;* for Computer Science Professor Harold Abelson et al. by *James S. Tyre;* for Professor Edward Lee et al. by *Mr. Lee, pro se;* for Charles Nesson by *Mr. Nesson, pro se;* and for Malla Pollack et al. by *Ms. Pollack, pro se.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Rick D. Nydegger* and *Melvin C. Garner;* for Audible Magic Corp. et al. by *Bruce V. Spiva* and *Jeremy H. Stern;* for Bridgemar Services, Ltd. d/b/a iMesh.com by *Jeffrey A. Kimmel;* for the Business Software Alliance by *E. Edward Bruce* and *Robert A. Long, Jr.;* for Creative Commons by *Lawrence Lessig;* for the Digital Media Association et al. by *Lawrence Robbins, Alan Untereiner, Markham C. Erickson,* and *Jerry Berman;* for Emerging Technology Companies by *Michael Traynor* and *Matthew D. Brown;* for IEEE-USA by *Matthew J. Conigliaro, Andrew C. Greenberg, Joseph H. Lang, Jr.,* and *Daniel E. Fisher;* for Innovation Scholars and Economists by *Laurence F. Pulgram;* for the Intellectual Property Owners Association by *James H. Pooley;* for Media Studies Professors by *Roy I. Liebman;* for the National Venture Capital Association by *Michael K. Kellogg, Mark L. Evans,* and *David L. Schwarz;* for Sharman Networks Limited by *Mr. Dorman;* for SNOCAP, Inc., by *Joel W. Nomkin;* for Kenneth J. Arrow et al. by *David A. Strauss;* for Lee A. Hollaar by *Lloyd W. Sadler;* for U. S. Senator Patrick Leahy et al. by *Mr. Leahy, pro se,* and *Senator Orrin G. Hatch, pro se;* and for Felix Oberholzer-Gee et al. by *Carl H. Settlemyer III* and *Arnold P. Lutzker.*

central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety. Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.[1]

Other users of peer-to-peer networks include individual recipients of Grokster's and StreamCast's software, and although the networks that they enjoy through using the software can be used to share any type of digital file, they have prominently employed those networks in sharing copyrighted music and video files without authorization. A group of copyright holders (MGM for short, but including motion picture studios, recording companies, songwriters, and music publishers) sued Grokster and StreamCast for their users' copyright infringements, alleging that they

---

[1] Peer-to-peer networks have disadvantages as well. Searches on peer-to-peer networks may not reach and uncover all available files because search requests may not be transmitted to every computer on the network. There may be redundant copies of popular files. The creator of the software has no incentive to minimize storage or bandwidth consumption, the costs of which are borne by every user of the network. Most relevant here, it is more difficult to control the content of files available for retrieval and the behavior of users.

knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act, 17 U. S. C. § 101 *et seq.* (2000 ed. and Supp. II).[2] MGM sought damages and an injunction.

Discovery during the litigation revealed the way the software worked, the business aims of each defendant company, and the predilections of the users. Grokster's eponymous software employs what is known as FastTrack technology, a protocol developed by others and licensed to Grokster. StreamCast distributes a very similar product except that its software, called Morpheus, relies on what is known as Gnutella technology.[3] A user who downloads and installs either software possesses the protocol to send requests for files directly to the computers of others using software compatible with FastTrack or Gnutella. On the FastTrack network opened by the Grokster software, the user's request goes to a computer given an indexing capacity by the software and designated a supernode, or to some other computer with comparable power and capacity to collect temporary indexes of the files available on the computers of users connected to it. The supernode (or indexing computer) searches its own index and may communicate the search request to other supernodes. If the file is found, the supernode discloses its location to the computer requesting it, and the requesting user can download the file directly from the computer located. The copied file is placed in a designated sharing folder on the requesting user's computer, where it is available for other users to download in turn, along with any other file in that folder.

---

[2] The studios and recording companies and the songwriters and music publishers filed separate suits against the defendants that were consolidated by the District Court.

[3] Subsequent versions of Morpheus, released after the record was made in this case, apparently rely not on Gnutella but on a technology called Neonet. These developments are not before us.

In the Gnutella network made available by Morpheus, the process is mostly the same, except that in some versions of the Gnutella protocol there are no supernodes. In these versions, peer computers using the protocol communicate directly with each other. When a user enters a search request into the Morpheus software, it sends the request to computers connected with it, which in turn pass the request along to other connected peers. The search results are communicated to the requesting computer, and the user can download desired files directly from peers' computers. As this description indicates, Grokster and StreamCast use no servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the software, there being no central point through which the substance of the communications passes in either direction.[4]

Although Grokster and StreamCast do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches. MGM commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download on the FastTrack system were copyrighted works.[5] Grokster and StreamCast dispute this figure, raising methodological problems and arguing that free copying even of copyrighted works may be authorized by the rightholders. They also argue that potential noninfringing uses of their software are significant in kind, even if infrequent in practice. Some musical performers, for example, have gained new audiences by distributing

[4] There is some evidence that both Grokster and StreamCast previously operated supernodes, which compiled indexes of files available on all of the nodes connected to them. This evidence, pertaining to previous versions of the defendants' software, is not before us and would not affect our conclusions in any event.

[5] By comparison, evidence introduced by the plaintiffs in *A&M Records, Inc.* v. *Napster, Inc.*, 239 F. 3d 1004 (CA9 2001), showed that 87% of files available on the Napster file-sharing network were copyrighted, *id.*, at 1013.

their copyrighted works for free across peer-to-peer networks, and some distributors of unprotected content have used peer-to-peer networks to disseminate files, Shakespeare being an example. Indeed, StreamCast has given Morpheus users the opportunity to download the briefs in this very case, though their popularity has not been quantified.

As for quantification, the parties' anecdotal and statistical evidence entered thus far to show the content available on the FastTrack and Gnutella networks does not say much about which files are actually downloaded by users, and no one can say how often the software is used to obtain copies of unprotected material. But MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, the probable scope of copyright infringement is staggering.

Grokster and StreamCast concede the infringement in most downloads, Brief for Respondents 10, n. 6, and it is uncontested that they are aware that users employ their software primarily to download copyrighted files, even if the decentralized FastTrack and Gnutella networks fail to reveal which files are being copied, and when. From time to time, moreover, the companies have learned about their users' infringement directly, as from users who have sent e-mail to each company with questions about playing copyrighted movies they had downloaded, to whom the companies have responded with guidance.[6] App. 559–563, 808–816, 939–954. And MGM notified the companies of 8 million copyrighted files that could be obtained using their software.

Grokster and StreamCast are not, however, merely passive recipients of information about infringing use. The record is replete with evidence that from the moment Grokster

[6] The Grokster founder contends that in answering these e-mails he often did not read them fully. App. 77, 769.

and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.

After the notorious file-sharing service, Napster, was sued by copyright holders for facilitation of copyright infringement, *A&M Records, Inc.* v. *Napster, Inc.*, 114 F. Supp. 2d 896 (ND Cal. 2000), aff'd in part, rev'd in part, 239 F. 3d 1004 (CA9 2001), StreamCast gave away a software program of a kind known as OpenNap, designed as compatible with the Napster program and open to Napster users for downloading files from other Napster and OpenNap users' computers. Evidence indicates that "[i]t was always [StreamCast's] intent to use [its OpenNap network] to be able to capture email addresses of [its] initial target market so that [it] could promote [its] StreamCast Morpheus interface to them," App. 861; indeed, the OpenNap program was engineered "'to leverage Napster's 50 million user base,'" *id.*, at 746.

StreamCast monitored both the number of users downloading its OpenNap program and the number of music files they downloaded. *Id.*, at 859, 863, 866. It also used the resulting OpenNap network to distribute copies of the Morpheus software and to encourage users to adopt it. *Id.*, at 861, 867, 1039. Internal company documents indicate that StreamCast hoped to attract large numbers of former Napster users if that company was shut down by court order or otherwise, and that StreamCast planned to be the next Napster. *Id.*, at 861. A kit developed by StreamCast to be delivered to advertisers, for example, contained press articles about StreamCast's potential to capture former Napster users, *id.*, at 568–572, and it introduced itself to some potential advertisers as a company "which is similar to what Napster was," *id.*, at 884. It broadcast banner advertisements to users of other Napster-compatible software, urging them to adopt its OpenNap. *Id.*, at 586. An internal e-mail from a company executive stated: "'We have put this network in

place so that when Napster pulls the plug on their free service . . . or if the Court orders them shut down prior to that . . . we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative.'" *Id.*, at 588–589, 861.

Thus, StreamCast developed promotional materials to market its service as the best Napster alternative. One proposed advertisement read: "Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it?" *Id.*, at 897. Another proposed ad touted StreamCast's software as the "#1 alternative to Napster" and asked "[w]hen the lights went off at Napster . . . where did the users go?" *Id.*, at 836 (ellipsis in original).[7] StreamCast even planned to flaunt the illegal uses of its software; when it launched the OpenNap network, the chief technology officer of the company averred that "[t]he goal is to get in trouble with the law and get sued. It's the best way to get in the new[s]." *Id.*, at 916.

The evidence that Grokster sought to capture the market of former Napster users is sparser but revealing, for Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Web site so that computer users using Web search engines to look for "Napster" or "[f]ree file sharing" would be directed to the Grokster Web site, where they could download the Grokster software. *Id.*, at 992–993. And Grokster's name is an apparent derivative of Napster.

StreamCast's executives monitored the number of songs by certain commercial artists available on their networks, and an internal communication indicates they aimed to have a larger number of copyrighted songs available on their net-

[7] The record makes clear that StreamCast developed these promotional materials but not whether it released them to the public. Even if these advertisements were not released to the public and do not show encouragement to infringe, they illuminate StreamCast's purposes.

works than other file-sharing networks. *Id.*, at 868. The point, of course, would be to attract users of a mind to infringe, just as it would be with their promotional materials developed showing copyrighted songs as examples of the kinds of files available through Morpheus. *Id.*, at 848. Morpheus in fact allowed users to search specifically for "Top 40" songs, *id.*, at 735, which were inevitably copyrighted. Similarly, Grokster sent users a newsletter promoting its ability to provide particular, popular copyrighted materials. Brief for Motion Picture Studio and Recording Company Petitioners 7–8.

In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases, advertising opportunities become worth more. Cf. App. 539, 804. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

Finally, there is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files. Although Grokster appears to have sent e-mails warning users about infringing content when it received threatening notice from the copyright holders, it never blocked anyone from continuing to use its software to share copyrighted files.

Id., at 75–76. StreamCast not only rejected another company's offer of help to monitor infringement, *id.*, at 928–929, but blocked the Internet Protocol addresses of entities it believed were trying to engage in such monitoring on its networks, *id.*, at 917–922.

B

After discovery, the parties on each side of the case cross-moved for summary judgment. The District Court limited its consideration to the asserted liability of Grokster and StreamCast for distributing the current versions of their software, leaving aside whether either was liable "for damages arising from *past* versions of their software, or from other past activities." 259 F. Supp. 2d 1029, 1033 (CD Cal. 2003). The District Court held that those who used the Grokster and Morpheus software to download copyrighted media files directly infringed MGM's copyrights, a conclusion not contested on appeal, but the court nonetheless granted summary judgment in favor of Grokster and StreamCast as to any liability arising from distribution of the then-current versions of their software. Distributing that software gave rise to no liability in the court's view, because its use did not provide the distributors with actual knowledge of specific acts of infringement. Case No. CV 01 08541 SVW (PJWx) (CD Cal., June 18, 2003), App. 1213.

The Court of Appeals affirmed. 380 F. 3d 1154 (CA9 2004). In the court's analysis, a defendant was liable as a contributory infringer when it had knowledge of direct infringement and materially contributed to the infringement. But the court read *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984), as holding that distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. The fact that the software was capable of substantial noninfringing uses in the Ninth Circuit's view meant

that Grokster and StreamCast were not liable, because they had no such actual knowledge, owing to the decentralized architecture of their software. The court also held that Grokster and StreamCast did not materially contribute to their users' infringement because it was the users themselves who searched for, retrieved, and stored the infringing files, with no involvement by the defendants beyond providing the software in the first place.

The Ninth Circuit also considered whether Grokster and StreamCast could be liable under a theory of vicarious infringement. The court held against liability because the defendants did not monitor or control the use of the software, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement. We granted certiorari. 543 U. S. 1032 (2004).

II

A

MGM and many of the *amici* fault the Court of Appeals's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff. See *Sony Corp.* v. *Universal City Studios*, *supra*, at 442; see generally Ginsburg, Copyright and Control Over New Technologies of Dissemination, 101 Colum. L. Rev. 1613 (2001); Lichtman & Landes, Indirect Liability for Copyright Infringement: An Economic Perspective, 16 Harv. J. L. & Tech. 395 (2003).

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy,

and many people (especially the young) use file-sharing software to download copyrighted works. This very breadth of the software's use may well draw the public directly into the debate over copyright policy, Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 705–717 (2004) (address by Register of Copyrights), and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection, Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 724–726 (2003). As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies. See, *e. g.*, Lemley & Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1386–1390 (2004); Brief for Innovation Scholars and Economists as *Amici Curiae* 15–20; Brief for Emerging Technology Companies as *Amici Curiae* 19–25; Brief for Intel Corporation as *Amicus Curiae* 20–22.[8]

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to

---

[8]The mutual exclusivity of these values should not be overstated, however. On the one hand technological innovators, including those writing file-sharing computer programs, may wish for effective copyright protections for their work. See, *e. g.*, Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 750 (2003). (StreamCast itself was urged by an associate to "get [its] technology written down and [its intellectual property] protected." App. 866.) On the other hand the widespread distribution of creative works through improved technologies may enable the synthesis of new works or generate audiences for emerging artists. See *Eldred* v. *Ashcroft*, 537 U. S. 186, 223–226 (2003) (STEVENS, J., dissenting); Van Houweling, Distributive Values in Copyright, 83 Texas L. Rev. 1535, 1539–1540, 1562–1564 (2005); Brief for Sovereign Artists et al. as *Amici Curiae* 11.

enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See *In re Aimster Copyright Litigation*, 334 F. 3d 643, 645–646 (CA7 2003).

One infringes contributorily by intentionally inducing or encouraging direct infringement, see *Gershwin Pub. Corp.* v. *Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (CA2 1971), and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, *Shapiro, Bernstein & Co.* v. *H. L. Green Co.*, 316 F. 2d 304, 307 (CA2 1963).[9] Although "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another," *Sony Corp.* v. *Universal City Studios*, 464 U. S., at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law, *id.*, at 486 (Blackmun, J., dissenting); *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Gershwin Pub. Corp.* v. *Columbia Artists Management*,

---

[9] We stated in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984), that "'the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn' . . . . [R]easoned analysis of [the *Sony* plaintiffs' contributory infringement claim] necessarily entails consideration of arguments and case law which may also be forwarded under the other labels, and indeed the parties . . . rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement," *id.*, at 435, n. 17 (quoting *Universal City Studios, Inc.* v. *Sony Corp. of America*, 480 F. Supp. 429, 457–458 (CD Cal. 1979)). In the present case MGM has argued a vicarious liability theory, which allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement. See, *e. g.*, *Shapiro, Bernstein & Co.* v. *H. L. Green Co.*, 316 F. 2d 304, 308 (CA2 1963); *Dreamland Ball Room, Inc.* v. *Shapiro, Bernstein & Co.*, 36 F. 2d 354, 355 (CA7 1929). Because we resolve the case based on an inducement theory, there is no need to analyze separately MGM's vicarious liability theory.

supra, at 1162; 3 M. Nimmer & D. Nimmer, Copyright § 12.04[A] (2005).

B

Despite the currency of these principles of secondary liability, this Court has dealt with secondary copyright infringement in only one recent case, and because MGM has tailored its principal claim to our opinion there, a look at our earlier holding is in order. In *Sony Corp.* v. *Universal City Studios*, *supra*, this Court addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There, the product, novel at the time, was what we know today as the videocassette recorder or VCR. Copyright holders sued Sony as the manufacturer, claiming it was contributorily liable for infringement that occurred when VCR owners taped copyrighted programs because it supplied the means used to infringe, and it had constructive knowledge that infringement would occur. At the trial on the merits, the evidence showed that the principal use of the VCR was for "'time-shifting,'" or taping a program for later viewing at a more convenient time, which the Court found to be a fair, not an infringing, use. *Id.*, at 423–424. There was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping. *Id.*, at 438. Although Sony's advertisements urged consumers to buy the VCR to "'record favorite shows'" or "'build a library'" of recorded programs, *id.*, at 459 (Blackmun, J., dissenting), neither of these uses was necessarily infringing, *id.*, at 424, 454–455.

On those facts, with no evidence of stated or indicated intent to promote infringing uses, the only conceivable basis for imposing liability was on a theory of contributory infringement arising from its sale of VCRs to consumers with knowledge that some would use them to infringe. *Id.*, at 439. But because the VCR was "capable of commercially significant noninfringing uses," we held the manufacturer

could not be faulted solely on the basis of its distribution. *Id.*, at 442.

This analysis reflected patent law's traditional staple article of commerce doctrine, now codified, that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. 35 U. S. C. § 271(c); *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 485 (1964) (noting codification of cases); *id.*, at 486, n. 6 (same). The doctrine was devised to identify instances in which it may be presumed from distribution of an article in commerce that the distributor intended the article to be used to infringe another's patent, and so may justly be held liable for that infringement. "One who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent." *New York Scaffolding Co.* v. *Whitney*, 224 F. 452, 459 (CA8 1915); see also *James Heekin Co.* v. *Baker*, 138 F. 63, 66 (CA8 1905); *Canda* v. *Michigan Malleable Iron Co.*, 124 F. 486, 489 (CA6 1903); *Thomson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 F. 712, 720–721 (CA6 1897); *Red Jacket Mfg. Co.* v. *Davis*, 82 F. 432, 439 (CA7 1897); *Holly* v. *Vergennes Machine Co.*, 4 F. 74, 82 (CC Vt. 1880); *Renwick* v. *Pond*, 20 F. Cas. 536, 541 (No. 11,702) (CC SDNY 1872).

In sum, where an article is "good for nothing else" but infringement, *Canda* v. *Michigan Malleable Iron Co.*, *supra*, at 489, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe, see *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 48 (1912), overruled on other grounds, *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917). Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute

fault than the mere understanding that some of one's products will be misused. It leaves breathing room for innovation and a vigorous commerce. See *Sony Corp.* v. *Universal City Studios*, 464 U. S., at 442; *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 221 (1980); *Henry* v. *A. B. Dick Co.*, *supra*, at 48.

The parties and many of the *amici* in this case think the key to resolving it is the *Sony* rule and, in particular, what it means for a product to be "capable of commercially significant noninfringing uses." *Sony Corp.* v. *Universal City Studios*, *supra*, at 442. MGM advances the argument that granting summary judgment to Grokster and StreamCast as to their current activities gave too much weight to the value of innovative technology, and too little to the copyrights infringed by users of their software, given that 90% of works available on one of the networks was shown to be copyrighted. Assuming the remaining 10% to be its noninfringing use, MGM says this should not qualify as "substantial," and the Court should quantify *Sony* to the extent of holding that a product used "principally" for infringement does not qualify. See Brief for Motion Picture Studio and Recording Company Petitioners 31. As mentioned before, Grokster and StreamCast reply by citing evidence that their software can be used to reproduce public domain works, and they point to copyright holders who actually encourage copying. Even if infringement is the principal practice with their software today, they argue, the noninfringing uses are significant and will grow.

We agree with MGM that the Court of Appeals misapplied *Sony*, which it read as limiting secondary liability quite beyond the circumstances to which the case applied. *Sony* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement. The

Ninth Circuit has read *Sony*'s limitation to mean that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties' infringing use of it; it read the rule as being this broad, even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product, unless the distributors had "specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information." 380 F. 3d, at 1162 (internal quotation marks and brackets omitted). Because the Circuit found the StreamCast and Grokster software capable of substantial lawful use, it concluded on the basis of its reading of *Sony* that neither company could be held liable, since there was no showing that their software, being without any central server, afforded them knowledge of specific unlawful uses.

This view of *Sony*, however, was error, converting the case from one about liability resting on imputed intent to one about liability on any theory. Because *Sony* did not displace other theories of secondary liability, and because we find below that it was error to grant summary judgment to the companies on MGM's inducement claim, we do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit's judgment rested on an erroneous understanding of *Sony* and to leave further consideration of the *Sony* rule for a day when that may be required.

C

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from

the common law.[10] *Sony Corp.* v. *Universal City Studios, supra*, at 439 ("If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge" of the potential for infringement). Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*'s staple-article rule will not preclude liability.

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or "entic[es] or persuad[es] another" to infringe, Black's Law Dictionary 790 (8th ed. 2004), as by advertising. Thus at common law a copyright or patent defendant who "not only expected but invoked [infringing use] by advertisement" was liable for infringement "on principles recognized in every part of the law." *Kalem Co.* v. *Harper Brothers*, 222 U. S., at 62–63 (copyright infringement). See also *Henry* v. *A. B. Dick Co.*, 224 U. S., at 48–49 (contributory liability for patent infringement may be found where a good's "most conspicuous use is one which will coöperate in an infringement when sale to such user is invoked by advertisement" of the infringing use); *Thomson-Houston Electric Co.* v. *Kelsey Electric R. Specialty Co.*, 75 F. 1005, 1007–1008 (CA2 1896) (relying on advertisements and displays to find defendant's "willingness . . . to aid other persons in any attempts which they may be disposed to make towards [patent] infringement"); *Rumford Chemical Works* v. *Hecker*, 20 F. Cas. 1342, 1346 (No. 12,133) (CC NJ 1876) (demonstrations of infringing activity along with "avowals of the [infringing] purpose and use for which it was made" supported liability for patent infringement).

---

[10] Nor does the Patent Act's exemption from liability for those who distribute a staple article of commerce, 35 U. S. C. §271(c), extend to those who induce patent infringement, §271(b).

The rule on inducement of infringement as developed in the early cases is no different today.[11] Evidence of "active steps . . . taken to encourage direct infringement," *Oak Industries, Inc.* v. *Zenith Electronics Corp.*, 697 F. Supp. 988, 992 (ND Ill. 1988), such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use, see, *e. g.*, *Water Technologies Corp.* v. *Calco, Ltd.*, 850 F. 2d 660, 668 (CA Fed. 1988) (liability for inducement where one "actively and knowingly aid[s] and abet[s] another's direct infringement" (emphasis deleted)); *Fromberg, Inc.* v. *Thornhill*, 315 F. 2d 407, 412–413 (CA5 1963) (demonstrations by sales staff of infringing uses supported liability for inducement); *Haworth Inc.* v. *Herman Miller Inc.*, 37 USPQ 2d 1080, 1090 (WD Mich. 1994) (evidence that defendant "demonstrate[d] and recommend[ed] infringing configurations" of its product could support inducement liability); *Sims* v. *Mack Trucks, Inc.*, 459 F. Supp. 1198, 1215 (ED Pa. 1978) (finding inducement where the use "depicted by the defendant in its promotional film and brochures infringes the . . . patent"), overruled on other grounds, 608 F. 2d 87 (CA3 1979). Cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 37 (5th ed. 1984) ("There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong").

For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as

---

[11] Inducement has been codified in patent law. *Ibid.*

shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, 464 U. S., at 439, n. 19, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.

III

A

The only apparent question about treating MGM's evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM's part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM claims that such a message is shown here. It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program, which was designed, as its name implied, to invite the custom of patrons of Napster, then under attack in the courts for facilitating massive infringement. Those who accepted StreamCast's OpenNap program were offered software to perform the same services, which a factfinder could conclude

would readily have been understood in the Napster market as the ability to download copyrighted music files. Grokster distributed an electronic newsletter containing links to articles promoting its software's ability to access popular copyrighted music. And anyone whose Napster or free file-sharing searches turned up a link to Grokster would have understood Grokster to be offering the same file-sharing ability as Napster, and to the same people who probably used Napster for infringing downloads; that would also have been the understanding of anyone offered Grokster's suggestively named Swaptor software, its version of OpenNap. And both companies communicated a clear message by responding affirmatively to requests for help in locating and playing copyrighted materials.

In StreamCast's case, of course, the evidence just described was supplemented by other unequivocal indications of unlawful purpose in the internal communications and advertising designs aimed at Napster users ("When the lights went off at Napster . . . where did the users go?" App. 836 (ellipsis in original)). Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection (and incidentally to point to actual violators likely to be found among those who hear or read the message). See *supra*, at 935–937. Proving that a message was sent out, then, is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts, and of showing that infringing acts took place by using the device distributed. Here, the summary judgment record is replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in *Sony*, acted with a purpose to cause copyright violations by use of software suitable for illegal use. See *supra*, at 924–927.

Three features of this evidence of intent are particularly notable. First, each company showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. StreamCast's internal documents made constant reference to Napster, it initially distributed its Morpheus software through an OpenNap program compatible with Napster, it advertised its OpenNap program to Napster users, and its Morpheus software functions as Napster did except that it could be used to distribute more kinds of files, including copyrighted movies and software programs. Grokster's name is apparently derived from Napster, it too initially offered an OpenNap program, its software's function is likewise comparable to Napster's, and it attempted to divert queries for Napster onto its own Web site. Grokster and StreamCast's efforts to supply services to former Napster users, deprived of a mechanism to copy and distribute what were overwhelmingly infringing files, indicate a principal, if not exclusive, intent on the part of each to bring about infringement.

Second, this evidence of unlawful objective is given added significance by MGM's showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants' failure to develop such tools as irrelevant because they lacked an independent duty to monitor their users' activity, we think this evidence underscores Grokster's and StreamCast's intentional facilitation of their users' infringement.[12]

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast

---

[12] Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.

and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.[13] This evidence alone would not justify an inference of unlawful intent, but viewed in the context of the entire record its import is clear.

The unlawful objective is unmistakable.

B

In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory of course requires evidence of actual infringement by recipients of the device, the software in this case. As the account of the facts indicates, there is evidence of infringement on a gigantic scale, and there is no serious issue of the adequacy of MGM's showing on this point in order to survive the companies' summary judgment requests. Al-

[13] Grokster and StreamCast contend that any theory of liability based on their conduct is not properly before this Court because the rulings in the trial and appellate courts dealt only with the present versions of their software, not "past acts . . . that allegedly encouraged infringement or assisted . . . known acts of infringement." Brief for Respondents 14; see also *id.*, at 34. This contention misapprehends the basis for their potential liability. It is not only that encouraging a particular consumer to infringe a copyright can give rise to secondary liability for the infringement that results. Inducement liability goes beyond that, and the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe. In such a case, the culpable act is not merely the encouragement of infringement but also the distribution of the tool intended for infringing use. See *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Cable/Home Communication Corp.* v. *Network Productions, Inc.*, 902 F. 2d 829, 846 (CA11 1990); *A&M Records, Inc.* v. *Abdallah*, 948 F. Supp. 1449, 1456 (CD Cal. 1996).

though an exact calculation of infringing use, as a basis for a claim of damages, is subject to dispute, there is no question that the summary judgment evidence is at least adequate to entitle MGM to go forward with claims for damages and equitable relief.

* * *

In sum, this case is significantly different from *Sony* and reliance on that case to rule in favor of StreamCast and Grokster was error. *Sony* dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course. The case struck a balance between the interests of protection and innovation by holding that the product's capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others.

MGM's evidence in this case most obviously addresses a different basis of liability for distributing a product open to alternative uses. Here, evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement. If liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was.

There is substantial evidence in MGM's favor on all elements of inducement, and summary judgment in favor of Grokster and StreamCast was error. On remand, reconsideration of MGM's motion for summary judgment will be in order.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring.

I concur in the Court's decision, which vacates in full the judgment of the Court of Appeals for the Ninth Circuit, *ante*, at 941, and write separately to clarify why I conclude that the Court of Appeals misperceived, and hence misapplied, our holding in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984). There is here at least a "genuine issue as to [a] material fact," Fed. Rule Civ. Proc. 56(c), on the liability of Grokster or StreamCast, not only for actively inducing copyright infringement, but also, or alternatively, based on the distribution of their software products, for contributory copyright infringement. On neither score was summary judgment for Grokster and StreamCast warranted.

At bottom, however labeled, the question in this case is whether Grokster and StreamCast are liable for the direct infringing acts of others. Liability under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court's opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of "substantial" or "commercially significant" noninfringing uses. *Sony*, 464 U. S., at 442; see also 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 12.04[A][2] (2005). While the two categories overlap, they capture different culpable behavior. Long coexisting, both are now codified in patent law. Compare 35 U. S. C. § 271(b) (active inducement liability) with § 271(c) (contributory liability for distribution of a product not "suitable for substantial noninfringing use").

In *Sony*, 464 U. S. 417, the Court considered Sony's liability for selling the Betamax videocassette recorder. It did so enlightened by a full trial record. Drawing an analogy to the staple article of commerce doctrine from patent law,

the *Sony* Court observed that the "sale of an article . . . adapted to [a patent] infringing use" does not suffice "to make the seller a contributory infringer" if the article "is also adapted to other and lawful uses." *Id.*, at 441 (quoting *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 48 (1912), overruled on other grounds, *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 517 (1917)).

"The staple article of commerce doctrine" applied to copyright, the Court stated, "must strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Sony*, 464 U. S., at 442. "Accordingly," the Court held, "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." *Ibid.* Thus, to resolve the *Sony* case, the Court explained, it had to determine "whether the Betamax is capable of commercially significant noninfringing uses." *Ibid.*

To answer that question, the Court considered whether "a significant number of [potential uses of the Betamax were] noninfringing." *Ibid.* The Court homed in on one potential use—private, noncommercial time-shifting of television programs in the home (*i. e.*, recording a broadcast TV program for later personal viewing). Time-shifting was noninfringing, the Court concluded, because in some cases trial testimony showed it was authorized by the copyright holder, *id.*, at 443–447, and in others it qualified as legitimate fair use, *id.*, at 447–455. Most purchasers used the Betamax principally to engage in time-shifting, *id.*, at 421, 423, a use that "plainly satisfie[d]" the Court's standard, *id.*, at 442. Thus, there was no need in *Sony* to "give precise content to the question of how much [actual or potential] use is commer-

cially significant." *Ibid.*[1] Further development was left for later days and cases.

The Ninth Circuit went astray, I will endeavor to explain, when that court granted summary judgment to Grokster and StreamCast on the charge of contributory liability based on distribution of their software products. Relying on its earlier opinion in *A&M Records, Inc.* v. *Napster, Inc.*, 239 F. 3d 1004 (CA9 2001), the Court of Appeals held that "if substantial noninfringing use was shown, the copyright owner would be required to show that the defendant had reasonable knowledge of specific infringing files." 380 F. 3d 1154, 1161 (CA9 2004). "A careful examination of the record," the

[1] JUSTICE BREYER finds in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984), a *"clear"* rule permitting contributory liability for copyright infringement based on distribution of a product only when the product "will be used *almost exclusively* to infringe copyrights." *Post*, at 957. But cf. *Sony*, 464 U. S., at 442 (recognizing "copyright holder's legitimate demand for effective—not merely symbolic—protection"). *Sony*, as I read it, contains no clear, near-exclusivity test. Nor have Courts of Appeals unanimously recognized JUSTICE BREYER's clear rule. Compare *A&M Records, Inc.* v. *Napster, Inc.*, 239 F. 3d 1004, 1021 (CA9 2001) ("[E]vidence of actual knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement."), with *In re Aimster Copyright Litigation*, 334 F. 3d 643, 649–650 (CA7 2003) ("[W]hen a supplier is offering a product or service that has noninfringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement. . . . But the balancing of costs and benefits is necessary only in a case in which substantial noninfringing uses, present or prospective, are demonstrated."). See also *Matthew Bender & Co.* v. *West Pub. Co.*, 158 F. 3d 693, 707 (CA2 1998) ("The Supreme Court applied [the *Sony*] test to prevent copyright holders from leveraging the copyrights in their original work to control distribution of . . . products that might be used incidentally for infringement, but that had substantial noninfringing uses. . . . The same rationale applies here [to products] that have substantial, predominant and noninfringing uses as tools for research and citation."). All Members of the Court agree, moreover, that "the Court of Appeals misapplied *Sony*," at least to the extent it read that decision to limit "secondary liability" to a hardly ever category, "quite beyond the circumstances to which the case applied." *Ante*, at 933.

court concluded, "indicates that there is no genuine issue of material fact as to noninfringing use." *Ibid.* The appeals court pointed to the band Wilco, which made one of its albums available for free downloading, to other recording artists who may have authorized free distribution of their music through the Internet, and to public domain literary works and films available through Grokster's and StreamCast's software. *Ibid.* Although it acknowledged petitioners' (hereinafter MGM) assertion that "the vast majority of the software use is for copyright infringement," the court concluded that Grokster's and StreamCast's proffered evidence met *Sony*'s requirement that "a product need only be *capable* of substantial noninfringing uses." 380 F. 3d, at 1162.[2]

This case differs markedly from *Sony*. Cf. Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 724 (2004) ("The *Grokster* panel's reading of *Sony* is the broadest that any court has given it . . . ."). Here, there has been no finding of any fair use and little beyond anecdotal evidence of noninfringing uses. In finding the Grokster and StreamCast software products capable of substantial noninfringing uses, the District Court and the Court of Appeals appear to have relied largely on declarations submitted by the defendants. These declarations include assertions (some of them hearsay) that a number of copyright owners authorize distribution of their works on the Internet and that some public domain material is available through peer-to-peer networks including those accessed through Grokster's and StreamCast's software. 380 F. 3d, at 1161; 259 F. Supp. 2d 1029, 1035–1036 (CD Cal. 2003); App. 125–171.

---

[2] Grokster and StreamCast, in the Court of Appeals' view, would be entitled to summary judgment unless MGM could show that the software companies had knowledge of specific acts of infringement and failed to act on that knowledge—a standard the court held MGM could not meet. 380 F. 3d, at 1162–1163.

The District Court declared it "undisputed that there are substantial noninfringing uses for Defendants' software," thus obviating the need for further proceedings. 259 F. Supp. 2d, at 1035. This conclusion appears to rest almost entirely on the collection of declarations submitted by Grokster and StreamCast. *Ibid.* Review of these declarations reveals mostly anecdotal evidence, sometimes obtained secondhand, of authorized copyrighted works or public domain works available online and shared through peer-to-peer networks, and general statements about the benefits of peer-to-peer technology. See, *e. g.*, Decl. of Janis Ian ¶ 13, App. 128 ("P2P technologies offer musicians an alternative channel for promotion and distribution."); Decl. of Gregory Newby ¶ 12, *id.*, at 136 ("Numerous authorized and public domain Project Gutenberg eBooks are made available on Morpheus, Kazaa, Gnutella, Grokster, and similar software products."); Decl. of Aram Sinnreich ¶ 6, *id.*, at 151 ("file sharing seems to have a net positive impact on music sales"); Decl. of John Busher ¶ 8, *id.*, at 166 ("I estimate that Acoustica generates sales of between $1,000 and $10,000 per month as a result of the distribution of its trialware software through the Gnutella and FastTrack Networks."); Decl. of Patricia D. Hoekman ¶¶ 3–4, *id.*, at 169–170 (search on Morpheus for "President Bush speeches" found several video recordings, searches for "Declaration of Independence" and "Bible" found various documents and declarant was able to download a copy of the Declaration); Decl. of Sean L. Mayers ¶ 11, *id.*, at 67 ("Existing open, decentralized peer-to-peer file-sharing networks . . . offer content owners distinct business advantages over alternate online distribution technologies."). Compare Decl. of Brewster Kahle ¶ 20, *id.*, at 142 ("Those who download the Prelinger films . . . are entitled to redistribute those files, and the Archive welcomes their redistribution by the Morpheus-Grokster-KaZaa community of users."), with Deposition of Brewster Kahle (Sept. 18,

2002), *id.*, at 396–403 (testifying that he has no knowledge of any person downloading a Prelinger film using Morpheus, Grokster, or KaZaA). Compare also Decl. of Richard Prelinger ¶ 17, *id.*, at 147 ("[W]e welcome further redistribution of the Prelinger films . . . by individuals using peer-to-peer software products like Morpheus, KaZaA and Grokster."), with Deposition of Richard Prelinger (Oct. 1, 2002), *id.*, at 410–411 ("Q. What is your understanding of Grokster? A. I have no understanding of Grokster. . . . Q. Do you know whether any user of the Grokster software has made available to share any Prelinger film? A. No."). See also Deposition of Aram Sinnreich (Sept. 25, 2002), *id.*, at 390 (testimony about the band Wilco based on "[t]he press and industry news groups and scuttlebutt."). These declarations do not support summary judgment in the face of evidence, proffered by MGM, of overwhelming use of Grokster's and StreamCast's software for infringement.[3]

---

[3] JUSTICE BREYER finds support for summary judgment in this motley collection of declarations and in a survey conducted by an expert retained by MGM. *Post*, at 952–955. That survey identified 75% of the files available through Grokster as copyrighted works owned or controlled by the plaintiffs, and 15% of the files as works likely copyrighted. App. 439. As to the remaining 10% of the files, "there was not enough information to form reasonable conclusions either as to what those files even consisted of, and/or whether they were infringing or non-infringing." *Id.*, at 479. Even assuming, as JUSTICE BREYER does, that the *Sony* Court would have absolved Sony of contributory liability solely on the basis of the use of the Betamax for authorized time-shifting, *post*, at 950–951, summary judgment is not inevitably appropriate here. *Sony* stressed that the plaintiffs there owned "well below 10%" of copyrighted television programming, 464 U. S., at 443, and found, based on trial testimony from representatives of the four major sports leagues and other individuals authorized to consent to home recording of their copyrighted broadcasts, that a similar percentage of program copying was authorized, *id.*, at 424. Here, the plaintiffs allegedly control copyrights for 70% or 75% of the material exchanged through the Grokster and StreamCast software, 380 F. 3d 1154, 1158 (CA9 2004); App. 439, and the District Court does not appear to have relied on comparable testimony about authorized copying from copyright holders.

Even if the absolute number of noninfringing files copied using the Grokster and StreamCast software is large, it does not follow that the products are therefore put to substantial noninfringing uses and are thus immune from liability. The number of noninfringing copies may be reflective of, and dwarfed by, the huge total volume of files shared. Further, the District Court and the Court of Appeals did not sharply distinguish between uses of Grokster's and StreamCast's software products (which this case is about) and uses of peer-to-peer technology generally (which this case is not about).

In sum, when the record in this case was developed, there was evidence that Grokster's and StreamCast's products were, and had been for some time, overwhelmingly used to infringe, *ante*, at 922–924; App. 434–439, 476–481, and that this infringement was the overwhelming source of revenue from the products, *ante*, at 925–926; 259 F. Supp. 2d, at 1043–1044. Fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time. On this record, the District Court should not have ruled dispositively on the contributory infringement charge by granting summary judgment to Grokster and StreamCast.[4]

If, on remand, the case is not resolved on summary judgment in favor of MGM based on Grokster and StreamCast actively inducing infringement, the Court of Appeals, I

---

[4] The District Court's conclusion that "[p]laintiffs do not dispute that [d]efendants' software is being used, and could be used, for substantial noninfringing purposes," 259 F. Supp. 2d 1029, 1036 (CD Cal. 2003); accord 380 F. 3d, at 1161, is, to say the least, dubious. In the courts below and in this Court, MGM has continuously disputed any such conclusion. Brief for Motion Picture Studio and Recording Company Petitioners 30–38; Brief for MGM Plaintiffs-Appellants in No. 03–55894 etc. (CA9), p. 41; App. 356–357, 361–365.

would emphasize, should reconsider, on a fuller record, its interpretation of *Sony*'s product distribution holding.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring.

I agree with the Court that the distributor of a dual-use technology may be liable for the infringing activities of third parties where he or she actively seeks to advance the infringement. *Ante*, at 919. I further agree that, in light of our holding today, we need not now "revisit" *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984). *Ante*, at 934. Other Members of the Court, however, take up the *Sony* question: whether Grokster's product is "capable of 'substantial' or 'commercially significant' noninfringing uses." *Ante*, at 942 (GINSBURG, J., concurring) (quoting *Sony*, *supra*, at 442). And they answer that question by stating that the Court of Appeals was wrong when it granted summary judgment on the issue in Grokster's favor. *Ante*, at 944. I write to explain why I disagree with them on this matter.

I

The Court's opinion in *Sony* and the record evidence (as described and analyzed in the many briefs before us) together convince me that the Court of Appeals' conclusion has adequate legal support.

A

I begin with *Sony*'s standard. In *Sony*, the Court considered the potential copyright liability of a company that did not itself illegally copy protected material, but rather sold a machine—a videocassette recorder (VCR)—that could be used to do so. A buyer could use that machine for *non*-infringing purposes, such as recording for later viewing (sometimes called "'time-shifting,'" *Sony*, 464 U. S., at 421) uncopyrighted television programs or copyrighted programs with a copyright holder's permission. The buyer could use

the machine for infringing purposes as well, such as building libraries of taped copyrighted programs. Or, the buyer might use the machine to record copyrighted programs under circumstances in which the legal status of the act of recording was uncertain (*i. e.*, where the copying may, or may not, have constituted a "fair use," *id.*, at 425–426). Sony knew many customers would use its VCRs to engage in unauthorized copying and "'library-building.'" *Id.*, at 458–459 (Blackmun, J., dissenting). But that fact, said the Court, was insufficient to make Sony itself an infringer. And the Court ultimately held that Sony was not liable for its customers' acts of infringement.

In reaching this conclusion, the Court recognized the need for the law, in fixing *secondary* copyright liability, to "strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Id.*, at 442. It pointed to patent law's "staple article of commerce" doctrine, *ibid.*, under which a distributor of a product is not liable for patent infringement by its customers unless that product is "unsuited for any commercial noninfringing use." *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 198 (1980). The Court wrote that the sale of copying equipment, "like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. *Indeed, it need merely be capable of substantial noninfringing uses.*" *Sony*, 464 U. S., at 442 (emphasis added). The Court ultimately characterized the legal "question" in the particular case as "whether [Sony's VCR] is *capable of commercially significant noninfringing uses*" (while declining to give "precise content" to these terms). *Ibid.* (emphasis added).

It then applied this standard. The Court had before it a survey (commissioned by the District Court and then prepared by the respondents) showing that roughly 9% of all

VCR recordings were of the type—namely, religious, educational, and sports programming—owned by producers and distributors testifying on Sony's behalf who did not object to time-shifting. See Brief for Respondents, O. T. 1983, No. 81–1687, pp. 52–53; see also *Sony, supra*, at 424 (7.3% of all Sony VCR use is to record sports programs; representatives of the sports leagues do not object). A much higher percentage of VCR *users* had at one point taped an authorized program, in addition to taping unauthorized programs. And the plaintiffs—not a large class of content providers as in this case—owned only a small percentage of the total available *un*authorized programming. See *ante*, at 947, n. 3 (GINSBURG, J., concurring). But of all the taping actually done by Sony's customers, only around 9% was of the sort the Court referred to as authorized.

The Court found that the magnitude of authorized programming was "significant," and it also noted the "significant potential for future authorized copying." 464 U. S., at 444. The Court supported this conclusion by referencing the trial testimony of professional sports league officials and a religious broadcasting representative. *Id.*, at 444, and n. 24. It also discussed (1) a Los Angeles educational station affiliated with the Public Broadcasting Service that made many of its programs available for home taping, and (2) Mr. Rogers' Neighborhood, a widely watched children's program. *Id.*, at 445. On the basis of this testimony and other similar evidence, the Court determined that producers of this kind had authorized duplication of their copyrighted programs "in significant enough numbers to create a *substantial* market for a noninfringing use of the" VCR. *Id.*, at 447, n. 28 (emphasis added).

The Court, in using the key word "substantial," indicated that these circumstances alone constituted a sufficient basis for rejecting the imposition of secondary liability. See *id.*, at 456 ("Sony demonstrated a significant likelihood that *substantial* numbers of copyright holders" would not object

to time-shifting (emphasis added)). Nonetheless, the Court buttressed its conclusion by finding separately that, in any event, *un*-authorized time-shifting often constituted not infringement, but "fair use." *Id.*, at 447–456.

B

When measured against *Sony*'s underlying evidence and analysis, the evidence now before us shows that Grokster passes *Sony*'s test—that is, whether the company's product is capable of substantial or commercially significant noninfringing uses. *Id.*, at 442. For one thing, petitioners' (hereinafter MGM) own expert declared that 75% of current files available on Grokster are infringing and 15% are "likely infringing." See App. 436–439, ¶¶ 6–17 (Decl. of Dr. Ingram Olkin); cf. *ante*, at 922 (opinion of the Court). That leaves some number of files near 10% that apparently are noninfringing, a figure very similar to the 9% or so of authorized time-shifting uses of the VCR that the Court faced in *Sony*.

As in *Sony*, witnesses here explained the nature of the noninfringing files on Grokster's network without detailed quantification. Those files include:

—Authorized copies of music by artists such as Wilco, Janis Ian, Pearl Jam, Dave Matthews, John Mayer, and others. See App. 152–153, ¶¶ 9–13 (Decl. of Aram Sinnreich) (Wilco's "lesson has already been adopted by artists still signed to their major labels"); *id.*, at 170, ¶¶ 5–7 (Decl. of Patricia D. Hoekman) (locating "numerous audio recordings" that were authorized for swapping); *id.*, at 74, ¶ 10 (Decl. of Daniel B. Rung) (describing Grokster's partnership with a company that hosts music from thousands of independent artists)

—Free electronic books and other works from various online publishers, including Project Gutenberg. See *id.*, at 136, ¶ 12 (Decl. of Gregory Newby) ("Numerous authorized and public domain Project Gutenberg eBooks are made available" on Grokster. Project Gutenberg "welcomes this widespread

sharing . . . using these software products[,] since they assist us in meeting our objectives"); *id.*, at 159–160, ¶ 32 (Decl. of Sinnreich)

—Public domain and authorized software, such as WinZip 8.1. *Id.*, at 170, ¶ 8 (Decl. of Hoekman); *id.*, at 165, ¶¶ 4–7 (Decl. of John Busher)

—Licensed music videos and television and movie segments distributed via digital video packaging with the permission of the copyright holder. *Id.*, at 70, ¶ 24 (Decl. of Sean L. Mayers).

The nature of these and other lawfully swapped files is such that it is reasonable to infer quantities of current lawful use roughly approximate to those at issue in *Sony*. At least, MGM has offered no evidence sufficient to survive summary judgment that could plausibly demonstrate a significant quantitative difference. See *ante*, at 922 (opinion of the Court); see also Brief for Motion Picture Studio and Recording Company Petitioners i (referring to "at least 90% of the total use of the services"); but see *ante*, at 947, n. 3 (GINSBURG, J., concurring). To be sure, in quantitative terms these uses account for only a small percentage of the total number of uses of Grokster's product. But the same was true in *Sony*, which characterized the relatively limited authorized copying market as "substantial." (The Court made clear as well in *Sony* that the amount of material then presently available for lawful copying—if not actually copied—was significant, see 464 U. S., at 444, and the same is certainly true in this case.)

Importantly, *Sony* also used the word "capable," asking whether the product is "*capable of*" substantial noninfringing uses. Its language and analysis suggest that a figure like 10%, if fixed for all time, might well prove insufficient, but that such a figure serves as an adequate foundation where there is a reasonable prospect of expanded legitimate uses over time. See *ibid.* (noting a "significant potential for future authorized copying"). And its language also indi-

cates the appropriateness of looking to potential future uses of the product to determine its "capability."

Here the record reveals a significant future market for noninfringing uses of Grokster-type peer-to-peer software. Such software permits the exchange of *any* sort of digital file—whether that file does, or does not, contain copyrighted material. As more and more uncopyrighted information is stored in swappable form, it seems a likely inference that lawful peer-to-peer sharing will become increasingly prevalent. See, *e. g.*, App. 142, ¶ 20 (Decl. of Brewster Kahle) ("[T]he [Internet Archive] welcomes [the] redistribution [of authorized films] by the Morpheus-Grokster-KaZaa community of users"); *id.*, at 166, ¶ 8 (Decl. of Busher) (sales figures of $1,000 to $10,000 per month through peer-to-peer networks "will increase in the future as Acoustica's trialware is more widely distributed through these networks"); *id.*, at 156–163, ¶¶ 21–40 (Decl. of Sinnreich).

And that is just what is happening. Such legitimate noninfringing uses are coming to include the swapping of: *research information* (the initial purpose of many peer-to-peer networks); *public domain films* (*e. g.*, those owned by the Prelinger Archive); *historical recordings and digital educational materials* (*e. g.*, those stored on the Internet Archive); *digital photos* (OurPictures, for example, is starting a P2P photo-swapping service); *"shareware" and "freeware"* (*e. g.*, Linux and certain Windows software); *secure licensed music and movie files* (Intent MediaWorks, for example, protects licensed content sent across P2P networks); *news broadcasts past and present* (the BBC Creative Archive lets users "rip, mix and share the BBC"); *user-created audio and video files* (including "podcasts" that may be distributed through P2P software); *and all manner of free "open content" works collected by Creative Commons* (one can search for Creative Commons material on StreamCast). See Brief for Distributed Computing Industry Association as *Amicus Curiae* 15–26; Merges, A New Dynamism in the Public Domain, 71

U. Chi. L. Rev. 183 (2004). I can find nothing in the record that suggests that this course of events will *not* continue to flow naturally as a consequence of the character of the software taken together with the foreseeable development of the Internet and of information technology. Cf. *ante*, at 920 (opinion of the Court) (discussing the significant benefits of peer-to-peer technology).

There may be other now-unforeseen noninfringing uses that develop for peer-to-peer software, just as the home-video rental industry (unmentioned in *Sony*) developed for the VCR. But the foreseeable development of such uses, when taken together with an estimated 10% noninfringing material, is sufficient to meet *Sony*'s standard. And while *Sony* considered the record following a trial, there are no facts asserted by MGM in its summary judgment filings that lead me to believe the outcome after a trial here could be any different. The lower courts reached the same conclusion.

Of course, Grokster itself may not want to develop these other noninfringing uses. But *Sony*'s standard seeks to protect not the Groksters of this world (which in any event may well be liable under today's holding), but the development of technology more generally. And Grokster's desires in this respect are beside the point.

II

The real question here, I believe, is not whether the record evidence satisfies *Sony*. As I have interpreted the standard set forth in that case, it does. And of the Courts of Appeals that have considered the matter, only one has proposed interpreting *Sony* more strictly than I would do—in a case where the product might have failed under *any* standard. *In re Aimster Copyright Litigation*, 334 F. 3d 643, 653 (CA7 2003) (defendant "failed to show that its service is *ever* used for any purpose other than to infringe" copyrights (emphasis added)); see *Matthew Bender & Co.* v. *West Pub. Co.*, 158

F. 3d 693, 706–707 (CA2 1998) (court did not *require* that noninfringing uses be "predominant," it merely found that they *were* predominant, and therefore provided no analysis of *Sony*'s boundaries); but see *ante*, at 944, n. 1 (GINSBURG, J., concurring); see also *A&M Records, Inc.* v. *Napster, Inc.*, 239 F. 3d 1004, 1020 (CA9 2001) (discussing *Sony*); *Cable/Home Communication Corp.* v. *Network Productions, Inc.*, 902 F. 2d 829, 842–847 (CA11 1990) (same); *Vault Corp.* v. *Quaid Software, Ltd.*, 847 F. 2d 255, 262 (CA5 1988) (same); cf. *Dynacore Holdings Corp.* v. *U. S. Philips Corp.*, 363 F. 3d 1263, 1275 (CA Fed. 2004) (same); see also *Doe* v. *GTE Corp.*, 347 F. 3d 655, 661 (CA7 2003) ("A person may be liable as a contributory infringer if the product or service it sells has no (or only slight) legal use").

Instead, the real question is whether we should modify the *Sony* standard, as MGM requests, or interpret *Sony* more strictly, as I believe JUSTICE GINSBURG's approach would do in practice. Compare *ante*, at 944–948 (concurring opinion) (insufficient evidence in this case of both present lawful uses and of a reasonable prospect that substantial noninfringing uses would develop over time), with *Sony*, 464 U. S., at 442–447 (basing conclusion as to the likely existence of a substantial market for authorized copying upon general declarations, some survey data, and common sense).

As I have said, *Sony* itself sought to "strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Id.*, at 442. Thus, to determine whether modification, or a strict interpretation, of *Sony* is needed, I would ask whether MGM has shown that *Sony* incorrectly balanced copyright and new-technology interests. In particular: (1) Has *Sony* (as I interpret it) worked to protect new technology? (2) If so, would modification or strict interpretation significantly weaken that protection? (3) If

so, would new or necessary copyright-related benefits outweigh any such weakening?

A

The first question is the easiest to answer. *Sony*'s rule, as I interpret it, has provided entrepreneurs with needed assurance that they will be shielded from copyright liability as they bring valuable new technologies to market.

Sony's rule is clear. That clarity allows those who develop new products that are capable of substantial noninfringing uses to know, *ex ante*, that distribution of their product will not yield massive monetary liability. At the same time, it helps deter them from distributing products that have no other real function than—or that are specifically intended for—copyright infringement, deterrence that the Court's holding today reinforces (by adding a weapon to the copyright holder's legal arsenal).

Sony's rule is strongly technology protecting. The rule deliberately makes it difficult for courts to find secondary liability where new technology is at issue. It establishes that the law will not impose copyright liability upon the distributors of dual-use technologies (who do not themselves engage in unauthorized copying) unless the product in question will be used *almost exclusively* to infringe copyrights (or unless they actively induce infringements as we today describe). *Sony* thereby recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently. Thus *Sony*'s rule shelters VCRs, typewriters, tape recorders, photocopiers, computers, cassette players, compact disc burners, digital video recorders, MP3 players, Internet search engines, and peer-to-peer software. But *Sony*'s rule does not shelter descramblers, even if one could *theoretically* use a descrambler in a noninfringing way. 464

U. S., at 441–442. Compare *Cable/Home Communication Corp., supra,* at 837–850 (developer liable for advertising television signal descrambler), with *Vault Corp., supra,* at 262 (primary use infringing but a substantial noninfringing use).

Sony's rule is forward looking. It does not confine its scope to a static snapshot of a product's current uses (thereby threatening technologies that have undeveloped future markets). Rather, as the VCR example makes clear, a product's market can evolve dramatically over time. And *Sony*—by referring to a *capacity* for substantial noninfringing uses—recognizes that fact. *Sony*'s word "capable" refers to a plausible, not simply a theoretical, likelihood that such uses will come to pass, and that fact anchors *Sony* in practical reality. Cf. *Aimster,* 334 F. 3d, at 651.

Sony's rule is mindful of the limitations facing judges where matters of technology are concerned. Judges have no specialized technical ability to answer questions about present or future technological feasibilility or commercial viability where technology professionals, engineers, and venture capitalists themselves may radically disagree and where answers may differ depending upon whether one focuses upon the time of product development or the time of distribution. Consider, for example, the question whether devices can be added to Grokster's software that will filter out infringing files. MGM tells us this is easy enough to do, as do several *amici* that produce and sell the filtering technology. See, *e. g.,* Brief for Motion Picture Studio and Recording Company Petitioners 11; Brief for Audible Magic Corp. et al. as *Amici Curiae* 3–10. Grokster says it is not at all easy to do, and not an efficient solution in any event, and several apparently disinterested computer science professors agree. See Brief for Respondents 31; Brief for Computer Science Professor Harold Abelson et al. as *Amici Curiae* 6–10, 14–18. Which account should a judge credit? *Sony* says that the judge will not necessarily have to decide.

Given the nature of the *Sony* rule, it is not surprising that in the last 20 years, there have been relatively few contributory infringement suits—based on a product distribution theory—brought against technology providers (a small handful of federal appellate court cases and perhaps fewer than two dozen District Court cases in the last 20 years). I have found nothing in the briefs or the record that shows that *Sony* has failed to achieve its innovation-protecting objective.

B

The second, more difficult, question is whether a modified *Sony* rule (or a strict interpretation) would significantly weaken the law's ability to protect new technology. JUSTICE GINSBURG's approach would require defendants to produce considerably more concrete evidence—more than was presented here—to earn *Sony*'s shelter. That heavier evidentiary demand, and especially the more dramatic (case-by-case balancing) modifications that MGM and the Government seek, would, I believe, undercut the protection that *Sony* now offers.

To require defendants to provide, for example, detailed evidence—say, business plans, profitability estimates, projected technological modifications, and so forth—would doubtless make life easier for copyright holder plaintiffs. But it would simultaneously increase the legal uncertainty that surrounds the creation or development of a new technology capable of being put to infringing uses. Inventors and entrepreneurs (in the garage, the dorm room, the corporate lab, or the boardroom) would have to fear (and in many cases endure) costly and extensive trials when they create, produce, or distribute the sort of information technology that can be used for copyright infringement. They would often be left guessing as to how a court, upon later review of the product and its uses, would decide when necessarily rough estimates amounted to sufficient evidence. They would have no way to predict how courts would weigh the respec-

tive values of infringing and noninfringing uses; determine the efficiency and advisability of technological changes; or assess a product's potential future markets. The price of a wrong guess—even if it involves a good-faith effort to assess technical and commercial viability—could be large statutory damages (not less than $750 and up to $30,000 *per infringed work*). 17 U. S. C. § 504(c)(1). The additional risk and uncertainty would mean a consequent additional chill of technological development.

C

The third question—whether a positive copyright impact would outweigh any technology-related loss—I find the most difficult of the three. I do not doubt that a more intrusive *Sony* test would generally provide greater revenue security for copyright holders. But it is harder to conclude that the gains on the copyright swings would exceed the losses on the technology roundabouts.

For one thing, the law disfavors equating the two different kinds of gain and loss; rather, it leans in favor of protecting technology. As *Sony* itself makes clear, the producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying—a fact that makes the attachment of copyright liability to the creation, production, or distribution of the technology an exceptional thing. See 464 U. S., at 431 (courts "must be circumspect" in construing the copyright laws to preclude distribution of new technologies). Moreover, *Sony* has been the law for some time. And that fact imposes a serious burden upon copyright holders like MGM to show a need for change in the current rules of the game, including a more strict interpretation of the test. See, *e. g.*, Brief for Motion Picture Studio and Recording Company Petitioners 31 (*Sony* should not protect products when the "primary or principal" use is infringing).

In any event, the evidence now available does not, in my view, make out a sufficiently strong case for change. To say

this is not to doubt the basic need to protect copyrighted material from infringement. The Constitution itself stresses the vital role that copyright plays in advancing the "useful Arts." Art. I, §8, cl. 8. No one disputes that "reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948). And deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft. See, *e. g.*, 18 U. S. C. §2319 (2000 ed. and Supp. II) (criminal copyright infringement); §1961(1)(B) (2000 ed., Supp. II) (copyright infringement can be a predicate act under the Racketeer Influenced and Corrupt Organizations Act); §1956(c)(7)(D) (2000 ed., Supp. II) (money laundering includes the receipt of proceeds from copyright infringement). But these highly general principles cannot by themselves tell us how to balance the interests at issue in *Sony* or whether *Sony*'s standard needs modification. And at certain key points, information is lacking.

Will an unmodified *Sony* lead to a significant diminution in the amount or quality of creative work produced? Since copyright's basic objective is creation and its revenue objectives but a means to that end, this is the underlying copyright question. See *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts"). And its answer is far from clear.

Unauthorized copying likely diminishes industry revenue, though it is not clear by how much. Compare S. Liebowitz, Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far 2 (June 2003), http://www.utdallas.edu/~liebowit/intprop/records.pdf (all Internet materials as visited June 24, 2005, and available in Clerk of Court's case file)

(file sharing has caused a decline in music sales), and Press Release, Informa Telecoms & Media, Steady Download Growth Defies P2P (Dec. 6, 2004), http://www.informatm.com (citing Informa Media Group Report, Music on the Internet (5th ed. 2004)) (estimating total lost sales to the music industry in the range of $2 billion annually), with F. Oberholzer & K. Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis 24 (Mar. 2004), www.unc.edu/~cigar/papers/FileSharing_March2004.pdf (academic study concluding that "file sharing has no statistically significant effect on purchases of the average album"), and D. McGuire, Study: File-Sharing No Threat to Music Sales (Mar. 29, 2004), http://www.washingtonpost.com/ac2/wp-dyn/A34300-2004Mar29?language=printer (discussing mixed evidence).

The extent to which related production has actually and resultingly declined remains uncertain, though there is good reason to believe that the decline, if any, is not substantial. See, *e. g.*, M. Madden, Pew Internet & American Life Project, Artists, Musicians, and the Internet 21 (Dec. 5, 2004), http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf (nearly 70% of musicians believe that file sharing is a minor threat or no threat at all to creative industries); Benkler, Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production, 114 Yale L. J. 273, 351–352 (2004) ("Much of the actual flow of revenue to artists—from performances and other sources—is stable even assuming a complete displacement of the CD market by peer-to-peer distribution . . . . [I]t would be silly to think that music, a cultural form without which no human society has existed, will cease to be in our world [because of illegal file swapping]").

More importantly, copyright holders at least potentially have other tools available to reduce piracy and to abate whatever threat it poses to creative production. As today's opinion makes clear, a copyright holder may proceed against

a technology provider where a provable specific intent to infringe (of the kind the Court describes) is present. *Ante*, at 941. Services like Grokster may well be liable under an inducement theory.

In addition, a copyright holder has always had the legal authority to bring a traditional infringement suit against one who wrongfully copies. Indeed, since September 2003, the Recording Industry Association of America (RIAA) has filed "thousands of suits against people for sharing copyrighted material." Walker, New Movement Hits Universities: Get Legal Music, Washington Post, Mar. 17, 2005, p. E1. These suits have provided copyright holders with damages; have served as a teaching tool, making clear that much file sharing, if done without permission, is unlawful; and apparently have had a real and significant deterrent effect. See, *e. g.*, L. Rainie, M. Madden, D. Hess, & G. Mudd, Pew Internet Project and comScore Media Metrix Data Memo: The state of music downloading and file-sharing online 2, 4, 6, 10 (Apr. 2004), http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (number of people downloading files fell from a peak of roughly 35 million to roughly 23 million in the year following the first suits; 38% of current downloaders report downloading fewer files because of the suits); M. Madden & L. Rainie, Pew Internet Project Data Memo: Music and video downloading moves beyond P2P, p. 7 (Mar. 2005), http://www.pewinternet.org/pdfs/PIP_Filesharing_March05.pdf (number of downloaders has "inched up" but "continues to rest well below the peak level"); Note, Costs and Benefits of the Recording Industry's Litigation Against Individuals, 20 Berkeley Tech. L. J. 571 (2005); but see Evangelista, File Sharing; Downloading Music and Movie Files is as Popular as Ever, San Francisco Chronicle, Mar. 28, 2005, p. E1 (referring to the continuing "tide of rampant copyright infringement," while noting that the RIAA says it believes the "campaign of lawsuits and public education has at least contained the problem").

Further, copyright holders may develop new technological devices that will help curb unlawful infringement. Some new technology, called "digital 'watermarking' " and "digital fingerprint[ing]," can encode within the file information about the author and the copyright scope and date, which "fingerprints" can help to expose infringers. RIAA Reveals Method to Madness, Wired News (Aug. 28, 2003), http://www.wired.com/news/digiwood/0,1412,60222,00.html; Besek, Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts, 27 Colum. J. L. & Arts 385, 391, 451 (2004). Other technology can, through encryption, potentially restrict users' ability to make a digital copy. See J. Borland, Tripping the Rippers, C/net News.com (Sept. 28, 2001), http://news.com.com/Tripping+the+rippers/2009-1023_3-273619.html; but see Brief for Bridgemar Services, Ltd. d/b/a iMesh.com as *Amicus Curiae* 5–8 (arguing that peer-to-peer service providers can more easily block unlawful swapping).

At the same time, advances in technology have discouraged unlawful copying by making *lawful* copying (*e. g.*, downloading music with the copyright holder's permission) cheaper and easier to achieve. Several services now sell music for less than $1 per song. (Walmart.com, for example, charges $0.88 each.) Consequently, many consumers initially attracted to the convenience and flexibility of services like Grokster are now migrating to lawful paid services (services with copying permission) where they can enjoy at little cost even greater convenience and flexibility without engaging in unlawful swapping. See Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 731–735 (2003) (noting the prevalence of technological problems on unpaid swapping sites); K. Dean, P2P Tilts Toward Legitimacy, Wired News (Nov. 24, 2004), http://www.wired.com/news/digiwood/0,1412,65836,00.html; Madden & Rainie, March 2005 Data Memo, *supra*, at 6–8 (percentage of current downloaders who have used paid services rose from 24% to 43% in a year; number using free services fell from 58% to 41%).

Thus, lawful music downloading services—those that charge the customer for downloading music and pay royalties to the copyright holder—have continued to grow and to produce substantial revenue. See Brief for Internet Law Faculty as *Amicus Curiae* 5–20; Bruno, Digital Entertainment: Piracy Fight Shows Encouraging Signs (Mar. 5, 2005), available at LEXIS, News Library, Billboard File (in 2004, consumers worldwide purchased more than 10 times the number of digital tracks purchased in 2003; global digital music market of $330 million in 2004 expected to double in 2005); Press Release, Informa Telecoms & Media, Steady Download Growth Defies P2P (global digital revenues will likely exceed $3 billion in 2010); Ashton, [International Federation of the Phonographic Industry] Predicts Downloads Will Hit the Mainstream, Music Week, Jan. 29, 2005, p. 6 (legal music sites and portable MP3 players "are helping to transform the digital music market" into "an everyday consumer experience"). And more advanced types of *non*-music-oriented peer-to-peer networks have also started to develop, drawing in part on the lessons of Grokster.

Finally, as *Sony* recognized, the legislative option remains available. Courts are less well suited than Congress to the task of "accommodat[ing] fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Sony*, 464 U. S., at 431; see, *e. g.*, Audio Home Recording Act of 1992, 106 Stat. 4237 (adding 17 U. S. C., ch. 10); Protecting Innovation and Art While Preventing Piracy: Hearing before the Senate Committee on the Judiciary, 108th Cong., 2d Sess. (2004).

I do not know whether these developments and similar alternatives will prove sufficient, but I am reasonably certain that, given their existence, a strong demonstrated need for modifying *Sony* (or for interpreting *Sony*'s standard more strictly) has not yet been shown. That fact, along with the added risks that modification (or strict interpretation) would impose upon technological innovation, leads me to the conclusion that we should maintain *Sony*, reading its standard as I

have read it. As so read, it requires affirmance of the Ninth Circuit's determination of the relevant aspects of the *Sony* question.

* * *

For these reasons, I disagree with JUSTICE GINSBURG, but I agree with the Court and join its opinion.

Syllabus

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION ET AL. *v.* BRAND X INTERNET SERVICES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–277. Argued March 29, 2005—Decided June 27, 2005*

Consumers traditionally access the Internet through "dial-up" connections provided via local telephone lines. Internet service providers (ISPs), in turn, link those calls to the Internet network, not only by providing a physical connection, but also by offering consumers the ability to translate raw data into information they may both view on their own computers and transmit to others connected to the Internet. Technological limitations of local telephone wires, however, retard the speed at which Internet data may be transmitted through such "narrowband" connections. "Broadband" Internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband service: cable modem service, which transmits data between the Internet and users' computers via the network of television cable lines owned by cable companies, and Digital Subscriber Line (DSL) service, which uses high-speed wires owned by local telephone companies. Other ways of transmitting high-speed Internet data, including terrestrial- and satellite-based wireless networks, are also emerging.

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, defines two categories of entities relevant here. "Information service" providers—those "offering . . . a capability for [processing] information via telecommunications," 47 U. S. C. § 153(20)—are not subject to mandatory regulation by the Federal Communications Commission as common carriers under Title II of the Act. Conversely, telecommunications carriers—*i. e.*, those "offering . . . telecommunications for a fee directly to the public . . . regardless of the facilities used," § 153(46)—are subject to mandatory Title II regulation. These two classifications originated in the late 1970's, as the Commission developed rules to regulate data-processing services offered over telephone wires. Regulated "telecommunications service" under the 1996 Act is the analog to "basic service" under the prior regime, the *Computer II* rules.

---

*Together with No. 04–281, *Federal Communications Commission et al.* v. *Brand X Internet Services et al.*, also on certiorari to the same court.

Those rules defined such service as a "pure" or "transparent" transmission capability over a communications path enabling the consumer to transmit an ordinary-language message to another point without computer processing or storage of the information, such as via a telephone or a facsimile. Under the 1996 Act, "[i]nformation service" is the analog to "enhanced" service, defined by the *Computer II* rules as computer-processing applications that act on the subscriber's information, such as voice and data storage services, as well as "protocol conversion," *i. e.*, the ability to communicate between networks that employ different data-transmission formats.

In the *Declaratory Ruling* under review, the Commission classified broadband cable modem service as an "information service" but not a "telecommunications service" under the 1996 Act, so that it is not subject to mandatory Title II common-carrier regulation. The Commission relied heavily on its *Universal Service Report*, which earlier classified "non-facilities-based" ISPs—those that do not own the transmission facilities they use to connect the end user to the Internet—solely as information-service providers. Because Internet access is a capability for manipulating and storing information, the Commission concluded, it was an "information service." However, the integrated nature of such access and the high-speed wire used to provide it led the Commission to conclude that cable companies providing it are not "telecommunications service" providers. Adopting the *Universal Service Report*'s reasoning, the Commission held that cable companies offering broadband Internet access, like non-facilities-based ISPs, do not offer the end user telecommunications service, but merely use telecommunications to provide end users with cable modem service.

Numerous parties petitioned for review. By judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge. That court granted the petitions in part, vacated the *Declaratory Ruling* in part, and remanded for further proceedings. In particular, the court held that the Commission could not permissibly construe the Communications Act to exempt cable companies providing cable modem service from mandatory Title II regulation. Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, however, the court grounded that holding in the *stare decisis* effect of its decision in *AT&T Corp.* v. *Portland*, 216 F. 3d 871, which had held that cable modem service is a "telecommunications service."

Held: The Commission's conclusion that broadband cable modem companies are exempt from mandatory common-carrier regulation is a lawful

Syllabus

construction of the Communications Act under *Chevron* and the Administrative Procedure Act. Pp. 980–1003.

1. *Chevron*'s framework applies to the Commission's interpretation of "telecommunications service." Pp. 980–986.

(a) *Chevron* governs this Court's review of the Commission's construction. See, *e. g.*, *National Cable & Telecommunications Assn., Inc.* v. *Gulf Power Co.*, 534 U. S. 327, 333–339. *Chevron* requires a federal court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable. 467 U. S., at 843–844, and n. 11, 865–866. The Commission's statutory authority to "execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary . . . to carry out the [Act's] provisions," § 201(b), give the Commission power to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and there is no dispute that the order is within the Commission's jurisdiction. Pp. 980–982.

(b) The Ninth Circuit should have applied *Chevron*'s framework, instead of following the contrary construction it adopted in *Portland*. A court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. See *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741. Because *Portland* held only that the *best* reading of § 153(46) was that cable modem service was "telecommunications service," not that this was the only permissible reading or that the Communications Act unambiguously required it, the Ninth Circuit erred in refusing to apply *Chevron*. Pp. 982–986.

2. The Commission's construction of § 153(46)'s "telecommunications service" definition is a permissible reading of the Communications Act at both steps of *Chevron*'s test. Pp. 986–1000.

(a) For the Commission, the question whether cable companies providing cable modem service "offe[r]" telecommunications within § 153(46)'s meaning turned on the nature of the functions offered the *end user*. Seen from the consumer's point of view, the Commission concluded, the cable wire is used to access the World Wide Web, newsgroups, etc., rather than "transparently" to transmit and receive ordinary-language messages without computer processing or storage of the message. The integrated character of this offering led the Commission to conclude that cable companies do not make a stand-alone, transparent offering of telecommunications. Pp. 986–988.

(b) The Commission's construction of § 153(46) is permissible at *Chevron*'s first step, which asks whether the statute's plain terms "directly addres[s] the precise question at issue." 467 U. S., at 843. This conclusion follows both from the ordinary meaning of "offering" and the Communications Act's regulatory history. Pp. 989–997.

(1) Where a statute's plain terms admit of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference. See, *e. g., Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 498. It is common usage to describe what a company "offers" to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product. What cable companies providing cable modem service "offer" is finished Internet service, though they do so using the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct "offerings." Pp. 989–992.

(2) The Commission's traditional distinction between basic and enhanced service also supports the conclusion that the Communications Act is ambiguous about whether cable companies "offer" telecommunications with cable modem service. Congress passed the Act's definitions against the background of this regulatory history, and it may be assumed that the parallel terms "telecommunications service" and "information service" substantially incorporated the meaning of "basic" and "enhanced" service. That history in at least two respects confirms that the term "telecommunications service" is ambiguous. First, in the *Computer II* order establishing the terms "basic" and "enhanced" services, the Commission defined those terms functionally, based on how the consumer interacts with the provided information, just as the Commission did in the order under review. Cable modem service is not "transparent" in terms of its interaction with customer-supplied information; the transmission occurs only in connection with information processing. It was therefore consistent with the statute's terms for the Commission to assume that the parallel term "telecommunications service" in § 153(46) likewise describes a "pure" or "transparent" communications path not necessarily separately present in an integrated information-processing service from the end user's perspective. Second, the Commission's application of the basic/enhanced service distinction to non-facilities-based ISPs also supports the Court's conclusion. The Commission has historically not subjected non-facilities-based information-service providers to common-carrier regulation. That history suggests, in turn, that the Act does not unambiguously classify non-facilities-based ISPs as "offerors" of telecommunications. If the Act does not unambiguously classify such providers as "offering tele-

communications," it also does not unambiguously so classify facilities-based information-service providers such as cable companies; the relevant definitions do not distinguish the two types of carriers. The Act's silence suggests, instead, that the Commission has the discretion to fill the statutory gap. Pp. 992–997.

(c) The Commission's interpretation is also permissible at *Chevron*'s step two because it is "a reasonable policy choice for the agency to make," 467 U. S., at 845. Respondents argue unpersuasively that the Commission's construction is unreasonable because it allows any communications provider to evade common-carrier regulation simply by bundling information service with telecommunications. That result does not follow from the interpretation adopted in the *Declaratory Ruling*. The Commission classified cable modem service solely as an information service because the telecommunications input used to provide cable modem service is not separable from the service's data-processing capabilities, but is part and parcel of that service and integral to its other capabilities, and therefore is not a telecommunications offering. This construction does not leave all information-service offerings unregulated under Title II. It is plain, for example, that a local telephone company cannot escape regulation by packaging its telephone service with voice mail because such packaging offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities voice mail provides. By contrast, the high-speed transmission used to provide cable modem service is a functionally integrated component of Internet service because it transmits data only in connection with the further processing of information and is necessary to provide such service. The Commission's construction therefore was more limited than respondents assume.

Respondents' argument that cable modem service does, in fact, provide "transparent" transmission from the consumer's perspective is also mistaken. Their characterization of the "information-service" offering of Internet access as consisting only of access to a cable company's e-mail service, its Web page, and the ability it provides to create a personal Web page conflicts with the Commission's reasonable understanding of the nature of Internet service. When an end user accesses a third party's Web site, the Commission concluded, he is equally using the information service provided by the cable company as when he accesses that company's own Web site, its e-mail service, or his personal Web page. As the Commission recognized, the service that Internet access providers offer the public is Internet access, not a transparent ability (from the end user's perspective) to transmit information. Pp. 997–1000.

3. The Court rejects respondent MCI, Inc.'s argument that the Commission's treatment of cable modem service is inconsistent with its treatment of DSL service and is therefore an arbitrary and capricious deviation from agency policy under the Administrative Procedure Act, see 5 U. S. C. § 706(2)(A). MCI points out that when local telephone companies began to offer Internet access through DSL technology, the Commission required them to make the telephone lines used to provide DSL available to competing ISPs on nondiscriminatory, common-carrier terms. Respondents claim that the Commission has not adequately explained its decision not to regulate cable companies similarly.

The Court thinks that the Commission has provided a reasoned explanation for this decision. The traditional reason for its *Computer II* common-carrier treatment of facilities-based carriers was that the *telephone network* was the primary, if not the exclusive, means through which information-service providers could gain access to their customers. The Commission applied the same treatment to DSL service based on that history, rather than on an analysis of contemporaneous market conditions. The Commission's *Declaratory Ruling*, by contrast, concluded that changed market conditions warrant different treatment of cable modem service. Unlike at the time of the DSL order, substitute forms of Internet transmission exist today, including wireline, cable, terrestrial wireless, and satellite. The Commission therefore concluded that broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market. There is nothing arbitrary or capricious about applying a fresh analysis to the cable industry. Pp. 1000–1002.

345 F. 3d 1120, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, and BREYER, JJ., joined. STEVENS, J., *post*, p. 1003, and BREYER, J., *post*, p. 1003, filed concurring opinions. SCALIA, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined as to Part I, *post*, p. 1005.

Paul T. Cappuccio argued the cause for petitioners in No. 04–277. With him on the briefs were *Howard J. Symons, Tara M. Corvo, Paul Glist, John D. Seiver, David E. Mills, Daniel L. Brenner, Neal M. Goldberg, Michael S. Schooler, Edward J. Weiss,* and *Henk Brands.*

Deputy Solicitor General Hungar argued the cause for federal petitioners in No. 04–281. With him on the briefs were *Acting Solicitor General Clement, Assistant Attorney*

General Pate, Deputy Assistant Attorney General Delrahim, James A. Feldman, Catherine G. O'Sullivan, Nancy C. Garrison, John A. Rogovin, Austin C. Schlick, Daniel M. Armstrong, Jacob M. Lewis, and *Nandan M. Joshi.*

Thomas C. Goldstein argued the cause for respondents in both cases. With him on the brief were *Amy Howe, John W. Butler, Earl W. Comstock, Alison B. Macdonald, Harvey L. Reiter, Matthew J. Verschelden,* and *Andrew Jay Schwartzman. William H. Sorrell,* Attorney General of Vermont, *David Borsykowsky,* Assistant Attorney General, and *Ellen S. LeVine* filed a brief in both cases for respondents State of Vermont et al. *Michael K. Kellogg, Sean A. Lev,* and *James G. Harralson* filed a brief in both cases for respondents BellSouth et al. *Andrew G. McBride, Eve Klindera Reed, William P. Barr, Michael E. Glover, Edward Shakin,* and *John P. Frantz* filed a brief in both cases for respondents Verizon Telephone Companies et al. *Mark D. Schneider, Marc A. Goldman,* and *Jeffrey A. Rackow* filed a brief in both cases for respondent MCI, Inc.†

JUSTICE THOMAS delivered the opinion of the Court.

Title II of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*, subjects all providers of "telecommunications servic[e]" to mandatory common-carrier regulation, § 153(44). In the order under review, the

---

†Briefs of *amici curiae* urging reversal in both cases were filed for the Telecommunications Industry Association by *Colleen L. Boothby* and *Andrew M. Brown;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *David Price.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of New Jersey, Board of Public Utilities, by *Peter C. Harvey,* Attorney General of New Jersey, *Andrea M. Silkowitz,* Assistant Attorney General, and *Kenneth J. Sheehan,* Deputy Attorney General; for AARP et al. by *Stacy Canan* and *Michael Schuster;* for the American Civil Liberties Union et al. by *Steven R. Shapiro, Christopher A. Hansen, Jennifer Stisa Granick,* and *Marjorie Heins;* and for the National Association of Regulatory Utility Commissioners by *James Bradford Ramsay.*

Federal Communications Commission concluded that cable companies that sell broadband Internet service do not provide "telecommunications servic[e]" as the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II. We must decide whether that conclusion is a lawful construction of the Communications Act under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and the Administrative Procedure Act, 5 U. S. C. §551 *et seq.* We hold that it is.

I

The traditional means by which consumers in the United States access the network of interconnected computers that make up the Internet is through "dial-up" connections provided over local telephone facilities. See 345 F. 3d 1120, 1123–1124 (CA9 2003) (cases below); *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802–4803, ¶ 9 (2002) (hereinafter *Declaratory Ruling*). Using these connections, consumers access the Internet by making calls with computer modems through the telephone wires owned by local phone companies. See *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 489–490 (2002) (describing the physical structure of a local telephone exchange). Internet service providers (ISPs), in turn, link those calls to the Internet network, not only by providing a physical connection, but also by offering consumers the ability to translate raw Internet data into information they may both view on their personal computers and transmit to other computers connected to the Internet. See *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11531, ¶ 63 (1998) (hereinafter *Universal Service Report* or *Report*); P. Huber, M. Kellogg, & J. Thorne, Federal Telecommunications Law 988 (2d ed. 1999) (hereinafter Huber); 345 F. 3d, at 1123–1124. Technological limitations of local telephone wires, however, retard the speed at which data from the Internet may be transmitted

through end users' dial-up connections. Dial-up connections are therefore known as "narrowband," or slower speed, connections.

"Broadband" Internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband Internet service: cable modem service and Digital Subscriber Line (DSL) service. Cable modem service transmits data between the Internet and users' computers via the network of television cable lines owned by cable companies. See *id.*, at 1124. DSL service provides high-speed access using the local telephone wires owned by local telephone companies. See *WorldCom, Inc.* v. *FCC*, 246 F. 3d 690, 692 (CADC 2001) (describing DSL technology). Cable companies and telephone companies can either provide Internet access directly to consumers, thus acting as ISPs themselves, or can lease their transmission facilities to independent ISPs that then use the facilities to provide consumers with Internet access. Other ways of transmitting high-speed Internet data into homes, including terrestrial- and satellite-based wireless networks, are also emerging. *Declaratory Ruling* 4802, ¶ 6.

II

At issue in these cases is the proper regulatory classification under the Communications Act of broadband cable Internet service. The Act, as amended by the Telecommunications Act of 1996, 110 Stat. 56, defines two categories of regulated entities relevant to these cases: telecommunications carriers and information-service providers. The Act regulates telecommunications carriers, but not information-service providers, as common carriers. Telecommunications carriers, for example, must charge just and reasonable, nondiscriminatory rates to their customers, 47 U. S. C. §§ 201–209, design their systems so that other carriers can interconnect with their communications networks, § 251(a)(1), and contribute to the federal "universal service" fund, § 254(d).

These provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it. §§ 160(a), (b). Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications, see §§ 151–161.

These two statutory classifications originated in the late 1970's, as the Commission developed rules to regulate data-processing services offered over telephone wires. That regime, the *"Computer II"* rules, distinguished between "basic" service (like telephone service) and "enhanced" service (computer-processing service offered over telephone lines). *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F. C. C. 2d 384, 417–423, ¶¶ 86–101 (1980) (hereinafter *Computer II Order*). The *Computer II* rules defined both basic and enhanced services by reference to how the consumer perceives the service being offered.

In particular, the Commission defined "basic service" as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Id.*, at 420, ¶ 96. By "pure" or "transparent" transmission, the Commission meant a communications path that enabled the consumer to transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network—such as via a telephone or a facsimile. *Id.*, at 419–420, ¶¶ 94–95. Basic service was subject to common-carrier regulation. *Id.*, at 428, ¶ 114.

"[E]nhanced service," however, was service in which "computer processing applications [were] used to act on the

content, code, protocol, and other aspects of the subscriber's information," such as voice and data storage services, *id.*, at 420–421, ¶ 97, as well as "protocol conversion" (*i. e.*, ability to communicate between networks that employ different data-transmission formats), *id.*, at 421–422, ¶ 99. By contrast to basic service, the Commission decided not to subject providers of enhanced service, even enhanced service offered via transmission wires, to Title II common-carrier regulation. *Id.*, at 428–432, ¶¶ 115–123. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving, competitive market" in which they were offered. *Id.*, at 434, ¶ 129.

The definitions of the terms "telecommunications service" and "information service" established by the 1996 Act are similar to the *Computer II* basic- and enhanced-service classifications. "Telecommunications service"—the analog to basic service—is "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U. S. C. § 153(46). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." § 153(43). "Telecommunications carrier[s]"—those subjected to mandatory Title II common-carrier regulation—are defined as "provider[s] of telecommunications services." § 153(44). And "information service"—the analog to enhanced service—is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." § 153(20).

In September 2000, the Commission initiated a rulemaking proceeding to, among other things, apply these classifications to cable companies that offer broadband Internet service directly to consumers. In March 2002, that rulemaking culminated in the *Declaratory Ruling* under review in these cases. In the *Declaratory Ruling*, the Commission con-

cluded that broadband Internet service provided by cable companies is an "information service" but not a "telecommunications service" under the Act, and therefore not subject to mandatory Title II common-carrier regulation. In support of this conclusion, the Commission relied heavily on its *Universal Service Report*. See *Declaratory Ruling* 4821–4822, ¶¶ 36–37 (citing *Universal Service Report*). The *Universal Service Report* classified "non-facilities-based" ISPs—those that do not own the transmission facilities they use to connect the end user to the Internet—solely as information-service providers. See *Universal Service Report* 11533, ¶ 67. Unlike those ISPs, cable companies own the cable lines they use to provide Internet access. Nevertheless, in the *Declaratory Ruling*, the Commission found no basis in the statutory definitions for treating cable companies differently from non-facilities-based ISPs: Both offer "a single, integrated service that enables the subscriber to utilize Internet access service . . . and to realize the benefits of a comprehensive service offering." *Declaratory Ruling* 4823, ¶ 38. Because Internet access provides a capability for manipulating and storing information, the Commission concluded that it was an information service. *Ibid.*

The integrated nature of Internet access and the high-speed wire used to provide Internet access led the Commission to conclude that cable companies providing Internet access are not telecommunications providers. This conclusion, the Commission reasoned, followed from the logic of the *Universal Service Report*. The *Report* had concluded that, though Internet service "involves data transport elements" because "an Internet access provider must enable the movement of information between customers' own computers and distant computers with which those customers seek to interact," it also "offers end users information-service capabilities inextricably intertwined with data transport." *Universal Service Report* 11539–11540, ¶ 80. ISPs, therefore, were not "offering . . . telecommunications . . . directly to the public,"

§ 153(46), and so were not properly classified as telecommunications carriers, see *id.*, at 11540, ¶ 81. In other words, the Commission reasoned that consumers use their cable modems not to transmit information "transparently," such as by using a telephone, but instead to obtain Internet access.

The Commission applied this same reasoning to cable companies offering broadband Internet access. Its logic was that, like non-facilities-based ISPs, cable companies do not "offe[r] telecommunications service to the end user, but rather . . . merely us[e] telecommunications to provide end users with cable modem service." *Declaratory Ruling* 4824, ¶ 41. Though the Commission declined to apply mandatory Title II common-carrier regulation to cable companies, it invited comment on whether under its Title I jurisdiction it should require cable companies to offer other ISPs access to their facilities on common-carrier terms. *Id.*, at 4839, ¶ 72. Numerous parties petitioned for judicial review, challenging the Commission's conclusion that cable modem service was not telecommunications service. By judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge.

The Court of Appeals granted the petitions in part, vacated the *Declaratory Ruling* in part, and remanded to the Commission for further proceedings. In particular, the Court of Appeals vacated the ruling to the extent it concluded that cable modem service was not "telecommunications service" under the Communications Act. It held that the Commission could not permissibly construe the Communications Act to exempt cable companies providing Internet service from Title II regulation. See 345 F. 3d, at 1132. Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron*, 467 U. S. 837, however, the Court of Appeals grounded its holding in the *stare decisis* effect of *AT&T Corp.* v. *Portland*, 216 F. 3d 871 (CA9 2000). See 345 F. 3d, at 1128–1132. *Portland* held that cable modem service was a "telecommunications serv-

ice," though the court in that case was not reviewing an administrative proceeding and the Commission was not a party to the case. See 216 F. 3d, at 877–880. Nevertheless, *Portland*'s holding, the Court of Appeals reasoned, overrode the contrary interpretation reached by the Commission in the *Declaratory Ruling*. See 345 F. 3d, at 1130–1131.

We granted certiorari to settle the important questions of federal law that these cases present. 543 U. S. 1018 (2004).

III

We first consider whether we should apply *Chevron*'s framework to the Commission's interpretation of the term "telecommunications service." We conclude that we should. We also conclude that the Court of Appeals should have done the same, instead of following the contrary construction it adopted in *Portland*.

A

In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U. S., at 865–866. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Id.*, at 843–844, and n. 11.

The *Chevron* framework governs our review of the Commission's construction. Congress has delegated to the Commission the authority to "execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, § 201(b); *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 377–378 (1999). These provisions give the Commission the authority to promulgate

binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction. See *Household Credit Services, Inc.* v. *Pfennig*, 541 U. S. 232, 238–239 (2004); *United States* v. *Mead Corp.*, 533 U. S. 218, 231–234 (2001); *Christensen* v. *Harris County*, 529 U. S. 576, 586–588 (2000). Hence, as we have in the past, we apply the *Chevron* framework to the Commission's interpretation of the Communications Act. See *National Cable & Telecommunications Assn., Inc.* v. *Gulf Power Co.*, 534 U. S. 327, 333–339 (2002); *Verizon*, 535 U. S., at 501–502.

Some of the respondents dispute this conclusion, on the ground that the Commission's interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 46–57 (1983). For if the agency adequately explains the reasons for a reversal of policy, "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996); see also *Rust* v. *Sullivan*, 500 U. S. 173, 186–187 (1991); *Barnhart* v. *Walton*, 535 U. S. 212, 226 (2002) (SCALIA, J., concurring in part and concurring in judgment). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis," *Chevron*, *supra*, at 863–864, for example, in response to changed factual circumstances, or a change in administrations, see *State Farm*, *supra*, at 59 (REHNQUIST, J., concurring in part and dissenting in part). That is no doubt why

in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy. See 467 U. S., at 857–858. We therefore have no difficulty concluding that *Chevron* applies.

B

The Court of Appeals declined to apply *Chevron* because it thought the Commission's interpretation of the Communications Act foreclosed by the conflicting construction of the Act it had adopted in *Portland*. See 345 F. 3d, at 1127–1132. It based that holding on the assumption that *Portland*'s construction overrode the Commission's, regardless of whether *Portland* had held the statute to be unambiguous. 345 F. 3d, at 1131. That reasoning was incorrect.

A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley, supra*, at 740–741. Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps. See 467 U. S., at 843–844, and n. 11. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute

unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," *Mead*, 533 U. S., at 247 (SCALIA, J., dissenting), by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results.

The dissent answers that allowing an agency to override what a court believes to be the best interpretation of a statute makes "judicial decisions subject to reversal by executive officers." *Post*, at 1016 (opinion of SCALIA, J.). It does not. Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable). The precedent has not been "reversed" by the agency, any more than a federal court's interpretation of a State's law can be said to have been "reversed" by a

state court that adopts a conflicting (yet authoritative) interpretation of state law.

The Court of Appeals derived a contrary rule from a mistaken reading of this Court's decisions. It read *Neal* v. *United States*, 516 U. S. 284 (1996), to establish that a prior judicial construction of a statute categorically controls an agency's contrary construction. 345 F. 3d, at 1131–1132; see also *post*, at 1016, n. 11 (SCALIA, J., dissenting). *Neal* established no such proposition. *Neal* declined to defer to a construction adopted by the United States Sentencing Commission that conflicted with one the Court previously had adopted in *Chapman* v. *United States*, 500 U. S. 453 (1991). *Neal*, *supra*, at 290–295. *Chapman*, however, had held the relevant statute to be unambiguous. See 500 U. S., at 463 (declining to apply the rule of lenity given the statute's clear language). Thus, *Neal* established only that a precedent holding a statute to be unambiguous forecloses a contrary agency construction. That limited holding accorded with this Court's prior decisions, which had held that a court's interpretation of a statute trumps an agency's under the doctrine of *stare decisis* only if the prior court holding "determined a statute's *clear* meaning." *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 131 (1990) (emphasis added); see also *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 536–537 (1992). Those decisions allow a court's prior interpretation of a statute to override an agency's interpretation only if the relevant court decision held the statute unambiguous.

Against this background, the Court of Appeals erred in refusing to apply *Chevron* to the Commission's interpretation of the definition of "telecommunications service," 47 U. S. C. § 153(46). Its prior decision in *Portland* held only that the *best* reading of § 153(46) was that cable modem service was a "telecommunications service," not that it was the *only permissible* reading of the statute. See 216 F. 3d, at 877–880. Nothing in *Portland* held that the Communica-

tions Act unambiguously required treating cable Internet providers as telecommunications carriers. Instead, the court noted that it was "not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine," *id.*, at 876; and the court invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to reach its judgment. Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction. *Portland* did not do so.

As the dissent points out, it is not logically necessary for us to reach the question whether the Court of Appeals misapplied *Chevron* for us to decide whether the Commission acted lawfully. See *post*, at 1019–1020 (opinion of SCALIA, J.). Nevertheless, it is no "great mystery" why we are reaching the point here. *Post*, at 1019. There is genuine confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles, as the petitioners informed us at the certiorari stage of this litigation. See Pet. for Cert. of Federal Communications Commission et al. in No. 04–281, pp. 19–23; Pet. for Cert. of National Cable & Telecomm. Assn. et al. in No. 04–277, pp. 22–29. The point has been briefed. See Brief for Federal Petitioners 38–44; Brief for Cable-Industry Petitioners 30–36. And not reaching the point could undermine the purpose of our grant of certiorari: to settle authoritatively whether the Commission's *Declaratory Ruling* is lawful. Were we to uphold the *Declaratory Ruling* without reaching the *Chevron* point, the Court of Appeals could once again strike down the Commission's rule based on its *Portland* decision. *Portland* (at least arguably) could compel the Court of Appeals once again to reverse the Commission despite our decision, since our conclusion that it is *reasonable* to read the Communications Act to classify cable modem service solely as an "infor-

mation service" leaves untouched *Portland*'s holding that the Commission's interpretation is not the *best* reading of the statute. We have before decided similar questions that were not, strictly speaking, necessary to our disposition. See, *e. g.*, *Agostini* v. *Felton*, 521 U. S. 203, 237 (1997) (requiring the Courts of Appeals to adhere to our directly controlling precedents, even those that rest on reasons rejected in other decisions); *Roper* v. *Simmons*, 543 U. S. 551, 628–629 (2005) (SCALIA, J., dissenting) (criticizing this Court for not reaching the question whether the Missouri Supreme Court erred by failing to follow directly controlling Supreme Court precedent, though that conclusion was not necessary to the Court's decision). It is prudent for us to do so once again today.

IV

We next address whether the Commission's construction of the definition of "telecommunications service," 47 U. S. C. § 153(46), is a permissible reading of the Communications Act under the *Chevron* framework. *Chevron* established a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful. At the first step, we ask whether the statute's plain terms "directly addres[s] the precise question at issue." 467 U. S., at 843. If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is "a reasonable policy choice for the agency to make." *Id.*, at 845. The Commission's interpretation is permissible at both steps.

A

We first set forth our understanding of the interpretation of the Communications Act that the Commission embraced. The issue before the Commission was whether cable companies providing cable modem service are providing a "telecommunications service" in addition to an "information service."

The Commission first concluded that cable modem service is an "information service," a conclusion unchallenged here. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." § 153(20). Cable modem service is an information service, the Commission reasoned, because it provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications. That service enables users, for example, to browse the World Wide Web, to transfer files from file archives available on the Internet via the "File Transfer Protocol," and to access e-mail and Usenet newsgroups. *Declaratory Ruling* 4821, ¶ 37; *Universal Service Report* 11537, ¶ 76. Like other forms of Internet service, cable modem service also gives users access to the Domain Name System (DNS). DNS, among other things, matches the Web page addresses that end users type into their browsers (or "click" on) with the Internet Protocol (IP) addresses[1] of the servers containing the Web pages the users wish to access. *Declaratory Ruling* 4821–4822, ¶ 37. All of these features, the Commission concluded, were part of the information service that cable companies provide consumers. *Id.*, at 4821–4823, ¶¶ 36–38; see also *Universal Service Report* 11536–11539, ¶¶ 75–79.

At the same time, the Commission concluded that cable modem service was not "telecommunications service." "Telecommunications service" is "the offering of telecommunications for a fee directly to the public." 47 U. S. C. § 153(46). "Telecommunications," in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

[1] IP addresses identify computers on the Internet, enabling data packets transmitted from other computers to reach them. See *Universal Service Report* 11531, ¶ 62; Huber 985.

§ 153(43). The Commission conceded that, like all information-service providers, cable companies use "telecommunications" to provide consumers with Internet service; cable companies provide such service via the high-speed wire that transmits signals to and from an end user's computer. *Declaratory Ruling* 4823, ¶ 40. For the Commission, however, the question whether cable broadband Internet providers "offer" telecommunications involved more than whether telecommunications was one necessary component of cable modem service. Instead, whether that service also includes a telecommunications "offering" "turn[ed] on the nature of the functions the *end user* is offered," *id.*, at 4822, ¶ 38 (emphasis added), for the statutory definition of "telecommunications service" does not "res[t] on the particular types of facilities used," *id.*, at 4821, ¶ 35; see § 153(46) (definition of "telecommunications service" applies "regardless of the facilities used").

Seen from the consumer's point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access: "As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Declaratory Ruling* 4823, ¶ 39. The wire is used, in other words, to access the World Wide Web, newsgroups, and so forth, rather than "transparently" to transmit and receive ordinary-language messages without computer processing or storage of the message. See *supra*, at 976 (noting the *Computer II* notion of "transparent" transmission). The integrated character of this offering led the Commission to conclude that cable modem service is not a "stand-alone," transparent offering of telecommunications. *Declaratory Ruling* 4823–4825, ¶¶ 41–43.

B

This construction passes *Chevron*'s first step. Respondents argue that it does not, on the ground that cable companies providing Internet service necessarily "offe[r]" the underlying telecommunications used to transmit that service. The word "offering" as used in § 153(46), however, does not unambiguously require that result. Instead, "offering" can reasonably be read to mean a "stand-alone" offering of telecommunications, *i. e.*, an offered service that, from the user's perspective, transmits messages unadulterated by computer processing. That conclusion follows not only from the ordinary meaning of the word "offering," but also from the regulatory history of the Communications Act.

1

Cable companies in the broadband Internet service business "offe[r]" consumers an information service in the form of Internet access and they do so "via telecommunications," § 153(20), but it does not inexorably follow as a matter of ordinary language that they also "offe[r]" consumers the high-speed data transmission (telecommunications) that is an input used to provide this service, § 153(46). We have held that where a statute's plain terms admit of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference. See *Verizon*, 535 U. S., at 498 (deferring to the Commission's interpretation of the term "cost" by reference to an alternative linguistic usage defined by what "[a] merchant who is asked about 'the cost of providing the goods'" might "reasonably" say); *National Railroad Passenger Corporation* v. *Boston & Maine Corp.*, 503 U. S. 407, 418 (1992) (agency construction entitled to deference where there were "alternative dictionary definitions of the word" at issue). The term "offe[r]" as used in the definition of telecommunications service, § 153(46), is ambiguous in this way.

It is common usage to describe what a company "offers" to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product, as the dissent concedes. See *post*, at 1006–1007 (opinion of SCALIA, J.). One might well say that a car dealership "offers" cars, but does not "offer" the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as "offering" consumers the car's components in addition to the car itself. Even if it is linguistically permissible to say that the car dealership "offers" engines when it offers cars, that shows, at most, that the term "offer," when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product's discrete components as well. It does not show that no other usage is permitted.

The question, then, is whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering. See *ibid.* We think that they are sufficiently integrated, because "[a] consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access." *Supra*, at 988. In the telecommunications context, it is at least reasonable to describe companies as not "offering" to consumers each discrete input that is necessary to providing, and is always used in connection with, a finished service. We think it no misuse of language, for example, to say that cable companies providing Internet service do not "offer" consumers DNS, even though DNS is essential to providing Internet access. *Declaratory Ruling* 4810, n. 74, 4822–4823, ¶ 38. Likewise, a telephone company "offers" consumers a transparent transmission path that conveys an ordinary-language message, not necessarily the data-

transmission facilities that also "transmi[t] . . . information of the user's choosing," § 153(43), or other physical elements of the facilities used to provide telephone service, like the trunks and switches, or the copper in the wires. What cable companies providing cable modem service and telephone companies providing telephone service "offer" is Internet service and telephone service respectively—the finished services, though they do so using (or "via") the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct "offerings."

In response, the dissent argues that the high-speed transmission component necessary to providing cable modem service is necessarily "offered" with Internet service because cable modem service is like the offering of pizza delivery service together with pizza, and the offering of puppies together with dog leashes. *Post*, at 1007–1008 (opinion of SCALIA, J.). The dissent's appeal to these analogies only underscores that the term "offer" is ambiguous in the way that we have described. The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance. As the Commission has candidly recognized, "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service." *Universal Service Report* 11530, ¶ 60. Because the term "offer" can sometimes refer to a single, finished product and sometimes to the "individual components in a package being offered" (depending on whether the components "still possess sufficient identity to be described

as separate objects," *post*, at 1006), the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission, not by warring analogies.

We also do not share the dissent's certainty that cable modem service is so obviously like pizza delivery service and the combination of dog leashes and dogs that the Commission could not reasonably have thought otherwise. *Post*, at 1007–1008. For example, unlike the transmission component of Internet service, delivery service and dog leashes are not integral components of the finished products (pizzas and pet dogs). One can pick up a pizza rather than having it delivered, and one can own a dog without buying a leash. By contrast, the Commission reasonably concluded, a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing. In any event, we doubt that a statute that, for example, subjected offerors of "delivery" service (such as Federal Express and United Parcel Service) to common-carrier regulation would unambiguously require pizza-delivery companies to offer their delivery services on a common-carrier basis.

2

The Commission's traditional distinction between basic and enhanced service, see *supra*, at 976–977, also supports the conclusion that the Communications Act is ambiguous about whether cable companies "offer" telecommunications with cable modem service. Congress passed the definitions in the Communications Act against the background of this regulatory history, and we may assume that the parallel terms "telecommunications service" and "information service" substantially incorporated their meaning, as the Commission has held. See, *e. g.*, *In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 9179–9180, ¶ 788

(1997) (noting that the "definition of enhanced services is substantially similar to the definition of information services" and that "all services previously considered 'enhanced services' are 'information services' "); *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159 (1993) (noting presumption that Congress is aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute). The regulatory history in at least two respects confirms that the term "telecommunications service" is ambiguous.

First, in the *Computer II Order* that established the terms "basic" and "enhanced" services, the Commission defined those terms functionally, based on how the consumer interacts with the provided information, just as the Commission did in the order below. See *supra*, at 976–977. As we have explained, Internet service is not "transparent in terms of its interaction with customer supplied information," *Computer II Order* 420, ¶ 96; the transmission occurs in connection with information processing. It was therefore consistent with the statute's terms for the Commission to assume that the parallel term "telecommunications service" in 47 U. S. C. § 153(46) likewise describes a "pure" or "transparent" communications path not necessarily separately present, from the end user's perspective, in an integrated information-service offering.

The Commission's application of the basic/enhanced-service distinction to non-facilities-based ISPs also supports this conclusion. The Commission has long held that "all those who provide some form of transmission services are not necessarily common carriers." *Computer II Order* 431, ¶ 122; see also *id.*, at 435, ¶ 132 ("acknowledg[ing] the existence of a communications component" in enhanced-service offerings). For example, the Commission did not subject to common-carrier regulation those service providers that offered enhanced services over telecommunications facilities, but that did not themselves own the underlying facilities—so-called "non-facilities-based" providers. See *Universal*

Service Report 11530, ¶ 60. Examples of these services included database services in which a customer used telecommunications to access information, such as Dow Jones News and Lexis, as well as "value added networks," which lease wires from common carriers and provide transmission as well as protocol-processing service over those wires. See *In re Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 3 FCC Rcd. 1150, 1153, n. 23 (1988); *supra*, at 977 (explaining protocol conversion). These services "combin[ed] communications and computing components," yet the Commission held that they should "always be deemed enhanced" and therefore not subject to common-carrier regulation. *Universal Service Report* 11530, ¶ 60. Following this traditional distinction, the Commission in the *Universal Service Report* classified ISPs that leased rather than owned their transmission facilities as pure information-service providers. *Id.*, at 11540, ¶ 81.

Respondents' statutory arguments conflict with this regulatory history. They claim that the Communications Act unambiguously classifies as telecommunications carriers all entities that use telecommunications inputs to provide information service. As respondent MCI concedes, this argument would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service to the public. Brief for Respondent MCI, Inc., 30. For example, it would subject to common-carrier regulation non-facilities-based ISPs that own no transmission facilities. See *Universal Service Report* 11532–11533, ¶ 66. Those ISPs provide consumers with transmission facilities used to connect to the Internet, see *supra*, at 974, and so, under respondents' argument, necessarily "offer" telecommunications to consumers. Respondents' position that all such entities are necessarily "offering telecommunications" therefore entails mandatory common-carrier regulation of entities that the Commission

never classified as "offerors" of basic transmission service, and therefore common carriers, under the *Computer II* regime.[2] See *Universal Service Report* 11540, ¶ 81 (noting past Commission policy); *Computer and Communications Industry Assn.* v. *FCC*, 693 F. 2d 198, 209 (CADC 1982) (noting and upholding Commission's *Computer II* "finding that enhanced services . . . are not common carrier services within the scope of Title II"). We doubt that the parallel term "telecommunications service" unambiguously worked this abrupt shift in Commission policy.

Respondents' analogy between cable companies that provide cable modem service and facilities-based enhanced-service providers—that is, enhanced-service providers who own the transmission facilities used to provide those services—fares no better. Respondents stress that under the *Computer II* rules the Commission regulated such providers more heavily than non-facilities-based providers. The Commission required, for example, local telephone companies that provided enhanced services to offer their wires on a common-carrier basis to competing enhanced-service providers. See, *e. g.*, *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F. C. C. 2d 958, 964, ¶ 4 (1986) (hereinafter *Computer III Order*). Respondents argue that the Communications Act unambiguously requires the same treatment for cable companies because cable companies also own the facilities they use to provide cable modem service (and therefore information service).

---

[2] The dissent attempts to escape this consequence of respondents' position by way of an elaborate analogy between ISPs and pizzerias. *Post*, at 1011 (opinion of SCALIA, J.). This analogy is flawed. A pizzeria "delivers" nothing, but ISPs plainly provide transmission service directly to the public in connection with Internet service. For example, with dial-up service, ISPs process the electronic signal that travels over local telephone wires, and transmit it to the Internet. See *supra*, at 974–975; Huber 988. The dissent therefore cannot deny that its position logically would require applying presumptively mandatory Title II regulation to all ISPs.

We disagree. We think it improbable that the Communications Act unambiguously freezes in time the *Computer II* treatment of facilities-based information-service providers. The Act's definition of "telecommunications service" says nothing about imposing more stringent regulatory duties on facilities-based information-service providers. The definition hinges solely on whether the entity "offer[s] telecommunications for a fee directly to the public," 47 U. S. C. § 153(46), though the Act elsewhere subjects facilities-based carriers to stricter regulation, see § 251(c) (imposing various duties on facilities-based local telephone companies). In the *Computer II* rules, the Commission subjected facilities-based providers to common-carrier duties not because of the nature of the "offering" made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the "bottleneck" local telephone facilities they owned. See *Computer II Order* 474–475, ¶¶ 229, 231; *Computer III Order* 968–969, ¶ 12; *Verizon*, 535 U. S., at 489–490 (describing the naturally monopolistic physical structure of a local telephone exchange). The differential treatment of facilities-based carriers was therefore a function not of the definitions of "enhanced-service" and "basic service," but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. The Act's definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which that policy choice was based, and the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction. In fact, it has invited comment on whether it can and should do so. See *supra*, at 979.

In sum, if the Act fails unambiguously to classify non-facilities-based information-service providers that use telecommunications inputs to provide an information service as "offer[ors]" of "telecommunications," then it also fails unam-

biguously to classify facilities-based information-service providers as telecommunications-service offerors; the relevant definitions do not distinguish facilities-based and non-facilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap.

C

We also conclude that the Commission's construction was "a reasonable policy choice for the [Commission] to make" at *Chevron*'s second step. 467 U. S., at 845.

Respondents argue that the Commission's construction is unreasonable because it allows any communications provider to "evade" common-carrier regulation by the expedient of bundling information service with telecommunications. Respondents argue that under the Commission's construction a telephone company could, for example, offer an information service like voice mail together with telephone service, thereby avoiding common-carrier regulation of its telephone service.

We need not decide whether a construction that resulted in these consequences would be unreasonable because we do not believe that these results follow from the construction the Commission adopted. As we understand the *Declaratory Ruling*, the Commission did not say that any telecommunications service that is priced or bundled with an information service is automatically unregulated under Title II. The Commission said that a telecommunications input used to provide an information service that is not "separable from the data-processing capabilities of the service" and is instead "part and parcel of [the information service] and is integral to [the information service's] other capabilities" is not a telecommunications offering. *Declaratory Ruling* 4823, ¶ 39; see *supra*, at 988.

This construction does not leave all information-service offerings exempt from mandatory Title II regulation. "It is plain," for example, that a local telephone company "cannot

escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail." *Universal Service Report* 11530, ¶ 60. That is because a telephone company that packages voice mail with telephone service offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities provided by voice mail. For instance, when a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability. Equally, were a telephone company to add a time-of-day announcement that played every time the user picked up his telephone, the "transparent" information transmitted in the ensuing call would be only trivially dependent on the information service the announcement provides. By contrast, the high-speed transmission used to provide cable modem service is a functionally integrated component of that service because it transmits data only in connection with the further processing of information and is necessary to provide Internet service. The Commission's construction therefore was more limited than respondents assume.

Respondents answer that cable modem service does, in fact, provide "transparent" transmission from the consumer's perspective, but this argument, too, is mistaken. Respondents characterize the "information-service" offering of Internet access as consisting only of access to a cable company's e-mail service, its Web page, and the ability it provides consumers to create a personal Web page. When a consumer goes beyond those offerings and accesses content provided by parties other than the cable company, respondents argue, the consumer uses "pure transmission" no less than a consumer who purchases phone service together with voice mail.

This argument, we believe, conflicts with the Commission's understanding of the nature of cable modem service, an understanding we find to be reasonable. When an end user

accesses a third-party's Web site, the Commission concluded, he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company's own Web site, its e-mail service, or his personal Web page. For example, as the Commission found below, part of the information service cable companies provide is access to DNS service. See *supra*, at 987. A user cannot reach a third-party's Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or "clicks" on with his mouse) with the IP address of the Web page's host server. See P. Albitz & C. Liu, DNS and BIND 10 (4th ed. 2001) (For an Internet user, "DNS is a must. . . . [N]early all of the Internet's network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer"). It is at least reasonable to think of DNS as a "capability for . . . acquiring . . . retrieving, utilizing, or making available" Web site addresses and therefore part of the information service cable companies provide. 47 U. S. C. § 153(20).[3] Similarly, the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or "cache," popular content on local computer servers. See *Declaratory Ruling* 4810, ¶ 17, and n. 76. Cacheing obviates the need for the end user to download anew information from third-party

[3] The dissent claims that access to DNS does not count as use of the information-processing capabilities of Internet service because DNS is "scarcely more than routing information, which is expressly excluded from the definition of 'information service.'" *Post*, at 1012–1013, and n. 6 (opinion of SCALIA, J.). But the definition of information service does not exclude "routing information." Instead, it excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U. S. C. § 153(20). The dissent's argument therefore begs the question because it assumes that Internet service is a "telecommunications system" or "service" that DNS manages (a point on which, contrary to the dissent's assertion, *post*, at 1013, n. 6, we need take no view for purposes of this response).

Web sites each time the consumer attempts to access them, thereby increasing the speed of information retrieval. In other words, subscribers can reach third-party Web sites via "the World Wide Web, and browse their contents, [only] because their service provider offers the 'capability for . . . acquiring, [storing] . . . retrieving [and] utilizing . . . information.'" *Universal Service Report* 11538, ¶ 76 (quoting 47 U. S. C. § 153(20)). "The service that Internet access providers offer to members of the public is Internet access," *Universal Service Report* 11539, ¶ 79, not a transparent ability (from the end user's perspective) to transmit information. We therefore conclude that the Commission's construction was reasonable.

V

Respondent MCI, Inc., urges that the Commission's treatment of cable modem service is inconsistent with its treatment of DSL service, see *supra*, at 975 (describing DSL service), and therefore is an arbitrary and capricious deviation from agency policy. See 5 U. S. C. § 706(2)(A). MCI points out that when local telephone companies began to offer Internet access through DSL technology in addition to telephone service, the Commission applied its *Computer II* facilities-based classification to them and required them to make the telephone lines used to transmit DSL service available to competing ISPs on nondiscriminatory, common-carrier terms. See *supra*, at 996 (describing *Computer II* facilities-based classification of enhanced-service providers); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, 24030–24031, ¶¶ 36–37 (1998) (hereinafter *Wireline Order*) (classifying DSL service as a telecommunications service). MCI claims that the Commission's decision not to regulate cable companies similarly under Title II is inconsistent with its DSL policy.

We conclude, however, that the Commission provided a reasoned explanation for treating cable modem service dif-

ferently from DSL service. As we have already noted, see *supra*, at 981–982, the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.[4] It has done so here. The traditional reason for its *Computer II* common-carrier treatment of facilities-based carriers (including DSL carriers), as the Commission explained, was "that the *telephone network* [was] the primary, if not exclusive, means through which information service providers can gain access to their customers." *Declaratory Ruling* 4825, ¶ 44 (emphasis in original; internal quotation marks omitted). The Commission applied the same treatment to DSL service based on that history, rather than on an analysis of contemporaneous market conditions. See *Wireline Order* 24031, ¶ 37 (noting DSL carriers' "continuing obligation" to offer their transmission facilities to competing ISPs on nondiscriminatory terms).

The Commission in the order under review, by contrast, concluded that changed market conditions warrant different treatment of facilities-based cable companies providing Internet access. Unlike at the time of *Computer II*, substitute forms of Internet transmission exist today: "[R]esidential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite." *Declaratory Ruling* 4802, ¶ 6; see also *U. S. Telecom Assn.* v. *FCC*, 290 F. 3d 415, 428 (CADC 2002) (noting Commission findings of "robust competition . . . in the broadband market"). The Commission concluded that "'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.'" *Declaratory Ruling* 4802, ¶ 5.

---

[4] Respondents vigorously argue that the Commission's purported inconsistent treatment is a reason for holding the Commission's construction impermissible under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Any inconsistency bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute.

This, the Commission reasoned, warranted treating cable companies unlike the facilities-based enhanced-service providers of the past. *Id.*, at 4825, ¶ 44. We find nothing arbitrary about the Commission's providing a fresh analysis of the problem as applied to the cable industry, which it has never subjected to these rules. This is adequate rational justification for the Commission's conclusions.

Respondents argue, in effect, that the Commission's justification for exempting cable modem service providers from common-carrier regulation applies with similar force to DSL providers. We need not address that argument. The Commission's decision appears to be a first step in an effort to reshape the way the Commission regulates information-service providers; that may be why it has tentatively concluded that DSL service provided by facilities-based telephone companies should also be classified solely as an information service. See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019, 3030, ¶ 20 (2002). The Commission need not immediately apply the policy reasoning in the *Declaratory Ruling* to all types of information-service providers. It apparently has decided to revisit its longstanding *Computer II* classification of facilities-based information-service providers incrementally. Any inconsistency between the order under review and the Commission's treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service and when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities. See *supra*, at 979 and this page. We express no view on those matters. In particular, we express no view on how the Commission should, or lawfully may, classify DSL service.

* * *

The questions the Commission resolved in the order under review involve a "subject matter [that] is technical, complex,

and dynamic." *Gulf Power*, 534 U. S., at 339. The Commission is in a far better position to address these questions than we are. Nothing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

While I join the Court's opinion in full, I add this caveat concerning Part III–B, which correctly explains why a court of appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by the agency. That explanation would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity.

JUSTICE BREYER, concurring.

I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority—though perhaps just barely. I write separately because I believe it important to point out that JUSTICE SCALIA, in my view, has wrongly characterized the Court's opinion in *United States* v. *Mead Corp.*, 533 U. S. 218 (2001). He states that the Court held in *Mead* that "some unspecified degree of formal process" before the agency "was required" for courts to accord the agency's decision deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). *Post*, at 1015 (dissenting opinion); see also *ibid.* (formal process is "at least the only safe harbor").

JUSTICE SCALIA has correctly characterized the way in which he, *in dissent*, characterized the Court's *Mead* opinion. 533 U. S., at 245–246. But the Court said the opposite. An

agency action qualifies for *Chevron* deference when Congress has explicitly or implicitly delegated to the agency the authority to "fill" a statutory "gap," including an interpretive gap created through an ambiguity in the language of a statute's provisions. *Chevron, supra,* at 843–844; *Mead, supra,* at 226–227. The Court said in *Mead* that such delegation "may be shown *in a variety of ways, as by* an agency's power to engage in adjudication or notice-and-comment rulemaking, *or by some other indication of a comparable congressional intent.*" 533 U. S., at 227 (emphasis added). The Court explicitly stated that the absence of notice-and-comment rulemaking did "not decide the case," for the Court has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.,* at 231. And the Court repeated that it "has recognized *a variety of indicators* that Congress would expect *Chevron* deference." *Id.,* at 237 (emphasis added).

It is not surprising that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute. It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways, including ways that JUSTICE SCALIA mentions. See, *e. g., Mead, supra,* at 231. It is not a sufficient condition because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue. Cf. *General Dynamics Land Systems, Inc.* v. *Cline,* 540 U. S. 581, 600 (2004) (rejecting agency's answer to question whether age discrimination law forbids discrimination against the relatively young).

Thus, while I believe JUSTICE SCALIA is right in emphasizing that *Chevron* deference may be appropriate in the ab-

sence of formal agency proceedings, *Mead* should not give him cause for concern.

JUSTICE SCALIA, with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Part I, dissenting.

The Federal Communications Commission (FCC or Commission) has once again attempted to concoct "a whole new regime of regulation (or of free-market competition)" under the guise of statutory construction. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 234 (1994). Actually, in these cases, it might be more accurate to say the Commission has attempted to establish a whole new regime of *non*-regulation, which will make for more or less free-market competition, depending upon whose experts are believed. The important fact, however, is that the Commission has chosen to achieve this through an implausible reading of the statute, and has thus exceeded the authority given it by Congress.

I

The first sentence of the FCC ruling under review reads as follows: "Cable modem service provides high-speed access to the Internet, *as well as* many applications or functions that can be used with that access, over cable system facilities." *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4799, ¶ 1 (2002) (hereinafter *Declaratory Ruling*) (emphasis added; footnote omitted). Does this mean that cable companies "offer" high-speed access to the Internet? Surprisingly not, if the Commission and the Court are to be believed.

It happens that cable-modem service is popular precisely because of the high-speed access it provides, and that, once connected with the Internet, cable-modem subscribers often use Internet applications and functions from providers other than the cable company. Nevertheless, for purposes of clas-

sifying what the cable company does, the Commission (with the Court's approval) puts all the emphasis on the rest of the package (the additional "applications or functions"). It does so by claiming that the cable company does not "offe[r]" its customers high-speed Internet access because it offers that access only in conjunction with particular applications and functions, rather than "separate[ly]," as a "stand-alone offering." *Id.*, at 4802, ¶ 7, 4823, ¶ 40.

The focus on the term "offer" appropriately derives from the statutory definitions at issue in these cases. Under the Telecommunications Act of 1996, 110 Stat. 59, "'information service'" involves the capacity to generate, store, interact with, or otherwise manipulate "information via telecommunications." 47 U. S. C. § 153(20). In turn, "'telecommunications'" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." § 153(43). Finally, "'telecommunications service'" is defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." § 153(46). The question here is whether cable-modem-service providers "offe[r] . . . telecommunications for a fee directly to the public." If so, they are subject to Title II regulation as common carriers, like their chief competitors who provide Internet access through other technologies.

The Court concludes that the word "offer" is ambiguous in the sense that it has "'alternative dictionary definitions'" that might be relevant. *Ante*, at 989 (quoting *National Railroad Passenger Corporation* v. *Boston & Maine Corp.*, 503 U. S. 407, 418 (1992)). It seems to me, however, that the analytic problem pertains not really to the meaning of "offer," but to the identity of what is offered. The relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been

so changed by their combination with the other components that it is no longer reasonable to describe them in that way.

Thus, I agree (to adapt the Court's example, *ante*, at 990) that it would be odd to say that a car dealer is in the business of selling steel or carpets because the cars he sells include both steel frames and carpeting. Nor does the water company sell hydrogen, nor the pet store water (though dogs and cats are largely water at the molecular level). But what is sometimes true is not, as the Court seems to assume, *always* true. There are instances in which it is ridiculous to deny that one part of a joint offering is being offered merely because it is not offered on a "'stand-alone'" basis, *ante*, at 989.

If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," *ante*, at 990, would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'" Cf. *Declaratory Ruling* 4823, ¶ 39; *ante*, at 988, 997–998.[1] Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.

In short, for the inputs of a finished service to qualify as the objects of an "offer" (as that term is reasonably understood), it is perhaps a sufficient, *but surely not a necessary*, condition that the seller offer separately "each discrete input

[1] The myth that the pizzeria does not offer delivery becomes even more difficult to maintain when the pizzeria advertises quick delivery as one of its advantages over competitors. That, of course, is the case with cable broadband.

that is necessary to providing . . . a finished service," *ante*, at 990. The pet store may have a policy of selling puppies only with leashes, but any customer will say that it *does* offer puppies—because a leashed puppy is still a puppy, even though it is not offered on a "stand-alone" basis.

Despite the Court's mighty labors to prove otherwise, *ante*, at 989–1000, the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative, *ante*, at 990, 993, 998, 1000. The Commission's ruling began by noting that cable-modem service provides *both* "high-speed access to the Internet" *and* other "applications and functions," *Declaratory Ruling* 4799, ¶ 1, because that is exactly how any reasonable consumer would perceive it: as consisting of two separate things.

The consumer's view of the matter is best assessed by asking what other products cable-modem service substitutes for in the marketplace. Broadband Internet service provided by cable companies is one of the three most common forms of Internet service, the other two being dial-up access and broadband Digital Subscriber Line (DSL) service. *Ante*, at 974–975. In each of the other two, the physical transmission pathway to the Internet is sold—indeed, *is legally required* to be sold—separately from the Internet functionality. With dial-up access, the physical pathway comes from the telephone company, and the Internet service provider (ISP) provides the functionality.

> "In the case of Internet access, the end user utilizes two different and distinct services. One is the transmission pathway, a telecommunications service that the end user purchases from the telephone company. The second is the Internet access service, which is an enhanced service provided by an ISP. . . . Th[e] functions [provided by the ISP] are separate from the transmission pathway

over which that data travels. The pathway is a regulated telecommunications service; the enhanced service offered over it is not." FCC, Office of Plans and Policy, J. Oxman, The FCC and the Unregulation of the Internet, p. 13 (Working Paper No. 31, July 1999), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf (as visited June 24, 2005, and available in Clerk of Court's case file).[2]

As the Court acknowledges, *ante*, at 1000, DSL service has been similar to dial-up service in the respect that the physical connection to the Internet must be offered separately from Internet functionality.[3] Thus, customers shopping for dial-up or DSL service will not be able to use the Internet unless they get both someone to provide them with a physical connection and someone to provide them with applications and functions such as e-mail and Web access. It is therefore inevitable that customers will regard the competing cable-modem service as giving them *both* computing functionality *and* the physical pipe by which that functionality comes to their computer—both the pizza and the delivery service that nondelivery pizzerias require to be purchased from the cab company.[4]

---

[2] See also *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11571–11572, ¶ 145 (1998) (end users "obtain telecommunications service from local exchange carriers, and then use information services provided by their Internet service provider and [Web site operators] in order to access [the Web]").

[3] In the DSL context, the physical connection is generally resold to the consumer by an ISP that has taken advantage of the telephone company's offer. The consumer knows very well, however, that the physical connection is a necessary component for Internet access which, just as in the dial-up context, is not provided by the ISP.

[4] The Court contends that this analogy is inapposite because one need not have a pizza delivered, *ante*, at 992, whereas one must purchase the cable connection in order to use cable's ISP functions. But the ISP functions provided by the cable company *can* be used without cable delivery—by accessing them from an Internet connection other than cable. The

Since the delivery service provided by cable (the broadband connection between the customer's computer and the cable company's computer-processing facilities) is downstream from the computer-processing facilities, there is no question that it merely serves as a conduit for the information services that have already been "assembled" by the cable company in its capacity as ISP. This is relevant because of the statutory distinction between an "information service" and "telecommunications." The former involves the capability of getting, processing, and manipulating information. § 153(20). The latter, by contrast, involves no "change in the form or content of the information as sent and received." § 153(43). When cable-company-assembled information enters the cable for delivery to the subscriber, the information service is already complete. The information has been (as the statute requires) generated, acquired, stored, transformed, processed, retrieved, utilized, or made available. All that remains is for the information in its final, unaltered form, to be delivered (via telecommunications) to the subscriber.

This reveals the insubstantiality of the fear invoked by both the Commission and the Court: the fear of what will happen to ISPs that do not provide the physical pathway to Internet access, yet still use telecommunications to acquire the pieces necessary to assemble the information that they pass back to their customers. According to this *reductio*, *ante*, at 993–995, if cable-modem-service providers are deemed to provide "telecommunications service," then so must *all* ISPs because they all "use" telecommunications in providing Internet functionality (by connecting to other

---

merger of the physical connection and Internet functions in cable's offerings has nothing to do with the "'inextricably intertwined,'" *ante*, at 978, nature of the two (like a car and its carpet), but is an artificial product of the cable company's marketing decision not to offer the two separately, so that the Commission could (by the *Declaratory Ruling* under review here) exempt it from common-carrier status.

parts of the Internet, including Internet backbone providers, for example). In terms of the pizzeria analogy, this is equivalent to saying that, if the pizzeria "offers" delivery, *all* restaurants "offer" delivery, because the ingredients of the food they serve their customers have come from other places; no matter how their customers get the food (whether by eating it at the restaurant, or by coming to pick it up themselves), they still consume a product for which delivery was a necessary "input." This is nonsense. Concluding that delivery of the finished pizza constitutes an "offer" of delivery does not require the conclusion that the serving of prepared food includes an "offer" of delivery. And that analogy does not even do the point justice, since "'telecommunications service'" is defined as "the offering of telecommunications for a fee *directly to the public.*" § 153(46) (emphasis added). The ISPs' use of telecommunications in their processing of information is not offered directly to the public.

The "regulatory history" on which the Court depends so much, *ante*, at 992–997, provides another reason why common-carrier regulation of all ISPs is not a worry. Under its *Computer Inquiry* rules, which foreshadowed the definitions of "information" and "telecommunications" services, *ante*, at 976–977, the Commission forbore from regulating as common carriers "value-added networks"—non-facilities-based providers who leased basic services from common carriers and bundled them with enhanced services; it said that they, unlike facilities-based providers, would be deemed to provide only enhanced services, *ante*, at 993–994.[5] That

[5] The Commission says forbearance cannot explain why value-added networks were not regulated as basic-service providers because it was not given the power to forbear until 1996. Reply Brief for Federal Petitioners 3–4, n. 1. It is true that when the Commission ruled on value-added networks, the statute did not explicitly provide for forbearance—any more than it provided for the categories of basic and enhanced services that the *Computer Inquiry* rules established, and through which the forbearance was applied. The D. C. Circuit, however, had long since recognized the

same result can be achieved today under the Commission's statutory authority to forbear from imposing most Title II regulations. § 160. In fact, the statutory criteria for forbearance—which include what is "just and reasonable," "necessary for the protection of consumers," and "consistent with the public interest," §§ 160(a)(1), (2), (3)—correspond well with the kinds of policy reasons the Commission has invoked to justify its peculiar construction of "telecommunications service" to exclude cable-modem service.

The Court also puts great stock in its conclusion that cable-modem subscribers cannot avoid using information services provided by the cable company in its ISP capacity, even when they only click-through to other ISPs. *Ante*, at 998–1000. For, even if a cable-modem subscriber uses e-mail from another ISP, designates some page not provided by the cable company as his home page, and takes advantage of none of the other standard applications and functions provided by the cable company, he will still be using the cable company's Domain Name System (DNS) server and, when he goes to popular Web pages, perhaps versions of them that are stored in the cable company's cache. This argument suffers from at least two problems. First, in the context of telephone services, the Court recognizes a *de minimis* exception to contamination of a telecommunications service by an information service. *Ante*, at 997–998. A similar exception would seem to apply to the functions in question here. DNS, in particular, is scarcely more than routing informa-

---

Commission's discretionary power to "forbear from Title II regulation." *Computer and Communications Industry Assn.* v. *FCC*, 693 F. 2d 198, 212 (1982).

The Commission also says its *Computer Inquiry* rules should not apply to cable because they were developed in the context of telephone lines. Brief for Federal Petitioners 35–36; see also *ante*, at 996. But to the extent that the statute imported the *Computer Inquiry* approach, there is no basis for applying it differently to cable than to telephone lines, since the definition of "telecommunications service" applies "regardless of the facilities used." 47 U. S. C. § 153(46).

tion, which is expressly excluded from the definition of "information service." §153(20).[6] Second, it is apparently possible to sell a telecommunications service separately from, although in conjunction with, ISP-like services; that is precisely what happens in the DSL context, and the Commission does not contest that it *could* be done in the context of cable. The only impediment appears to be the Commission's failure to require from cable companies the unbundling that it required of facilities-based providers under its *Computer Inquiry*.

Finally, I must note that, notwithstanding the Commission's self-congratulatory paean to its deregulatory largesse, *e. g.*, Brief for Federal Petitioners 29–32, it concluded the *Declaratory Ruling* by asking, as the Court paraphrases, "whether under its Title I jurisdiction [the Commission] should require cable companies to offer other ISPs access to their facilities on common-carrier terms." *Ante*, at 979; see also Reply Brief for Federal Petitioners 9; Tr. of Oral Arg. 17. In other words, what the Commission hath given, the Commission may well take away—unless it doesn't. This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in

---

[6] The Court says that invoking this explicit exception from the definition of information services, which applies only to the "management, control, or operation of a telecommunications system or the management of a telecommunications service," §153(20), begs the question whether cable-modem service includes a telecommunications service, *ante*, at 999, n. 3. I think not, and cite the exception only to demonstrate that the incidental functions do not *prevent* cable from including a telecommunications service *if it otherwise qualifies*. It is rather the Court that begs the question, saying that the exception cannot apply because cable is not a telecommunications service.

its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (*i. e.*, its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service.[7] And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under § 160 (which it has already tentatively concluded it would do, *Declaratory Ruling* 4847–4848, ¶¶ 94–95). Such Möbius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.

After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is "offering" telecommunications. For that simple reason set forth in the statute, I would affirm the Court of Appeals.

II

In Part III–B of its opinion, the Court continues the administrative-law improvisation project it began four years ago in *United States* v. *Mead Corp.*, 533 U. S. 218 (2001). To the extent it set forth a comprehensible rule,[8] *Mead* drasti-

[7] Under the Commission's assumption that cable-modem-service providers are not providing "telecommunications services," there is reason to doubt whether it can use its Title I powers to impose common-carrier-like requirements, since § 153(44) specifically provides that a "telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services" (emphasis added), and "this chapter" includes Titles I and II.

[8] For a description of the confusion *Mead* has produced, see Vermeule, *Mead* in the Trenches, 71 Geo. Wash. L. Rev. 347, 361 (2003) (concluding that "the Court has inadvertently sent the lower courts stumbling into a no-man's land"); Bressman, How *Mead* Has Muddled Judicial Review of

cally limited the categories of agency action that would qualify for deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). For example, the position taken by an agency before the Supreme Court, with full approval of the agency head, would not qualify. Rather, some unspecified degree of formal process was required—or was at least the only safe harbor. See *Mead*, *supra*, at 245–246 (SCALIA, J., dissenting).[9]

This meant that many more issues appropriate for agency determination would reach the courts without benefit of an agency position entitled to *Chevron* deference, requiring the courts to rule on these issues *de novo*.[10] As I pointed out in

---

Agency Action, 58 Vand. L. Rev. 1443, 1475 (2005) ("*Mead* has muddled judicial review of agency action").

[9] JUSTICE BREYER attempts to clarify *Mead* by repeating its formulations that the Court has "sometimes found reasons" to give *Chevron* deference in a (still-unspecified) "variety of ways" or because of a (still-unspecified) "variety of indicators," *ante*, at 1004 (concurring opinion) (internal quotation marks and emphasis omitted). He also notes that deference is sometimes inappropriate for reasons unrelated to the agency's process. Surprising those who thought the Court's decision not to defer to the agency in *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581 (2004), depended on its conclusion that there was "no serious question . . . about purely textual ambiguity" in the statute, *id.*, at 600, JUSTICE BREYER seemingly attributes that decision to a still-underdeveloped exception to *Chevron* deference—one for "unusually basic legal question[s]," *ante*, at 1004. The Court today (thankfully) does not follow this approach: It bases its decision on what it sees as statutory ambiguity, *ante*, at 996–997, without asking whether the classification of cable-modem service is an "unusually basic legal question."

[10] It is true that, even under the broad basis for deference that I propose (viz., any agency position that plainly has the approval of the agency head, see *United States* v. *Mead Corp.*, 533 U. S. 218, 256–257 (2001) (SCALIA, J., dissenting)), some interpretive matters will be decided *de novo*, without deference to agency views. This would be a rare occurrence, however, at the Supreme Court level—at least with respect to matters of any significance to the agency. Seeking to achieve 100% agency control of ambiguous provisions through the complicated method the Court proposes is not worth the incremental benefit.

dissent, this in turn meant (under the law as it was understood until today)[11] that many statutory ambiguities that might be resolved in varying fashions by successive agency administrations would be resolved finally, conclusively, and forever, by federal judges—producing an "ossification of large portions of our statutory law," 533 U. S., at 247. The Court today moves to solve this problem of its own creation by inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive officers.

Imagine the following sequence of events: FCC action is challenged as ultra vires under the governing statute; the litigation reaches all the way to the Supreme Court of the United States. The Solicitor General sets forth the FCC's official position (approved by the Commission) regarding interpretation of the statute. Applying *Mead*, however, the Court denies the agency position *Chevron* deference, finds that the *best* interpretation of the statute contradicts the agency's position, and holds the challenged agency action unlawful. The agency promptly conducts a rulemaking, and

---

[11] The Court's unanimous holding in *Neal* v. *United States*, 516 U. S. 284 (1996), plainly rejected the notion that any form of deference could cause the Court to revisit a prior statutory-construction holding: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Id.*, at 295. The Court attempts to reinterpret this plain language by dissecting the cases *Neal* cited, noting that they referred to previous determinations of "'a statute's clear meaning.'" *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 537 (1992) (quoting *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 131 (1990)). But those cases reveal that today's focus on the term "clear" is revisionist. The oldest case in the chain using that word, *Maislin Industries*, did not rely on a prior decision that held the statute to be clear, but on a run-of-the-mill statutory interpretation contained in a 1908 decision. *Id.*, at 130–131. When *Maislin Industries* referred to the Court's prior determination of "a statute's clear meaning," it was referring to the fact that the prior decision had made the statute clear, and was not conducting a retrospective inquiry into whether the prior decision had declared the statute itself to be clear on its own terms.

adopts a rule that comports with its earlier position—in effect disagreeing with the Supreme Court concerning the best interpretation of the statute. According to today's opinion, the agency is thereupon free to take the action that the Supreme Court found unlawful.

This is not only bizarre. It is probably unconstitutional. As we held in *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103 (1948), Article III courts do not sit to render decisions that can be reversed or ignored by executive officers. In that case, the Court of Appeals had determined it had jurisdiction to review an order of the Civil Aeronautics Board awarding an overseas air route. By statute such orders were subject to Presidential approval and the order in question had in fact been approved by the President. *Id.*, at 110–111. In order to avoid any conflict with the President's foreign-affairs powers, the Court of Appeals concluded that it would review the board's action "as a regulatory agent of Congress," and the results of that review would remain subject to approval or disapproval by the President. *Id.*, at 112–113. As I noted in my *Mead* dissent, 533 U. S., at 248, the Court bristled at the suggestion: "Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Waterman*, *supra*, at 113. That is what today's decision effectively allows. Even when the agency itself is party to the case in which the Court construes a statute, the agency will be able to disregard that construction and seek *Chevron* deference for its contrary construction the next time around.[12]

---

[12] The Court contends that no reversal of judicial holdings is involved, because "a court's opinion as to the best reading of an ambiguous statute . . . is not authoritative," *ante*, at 983. That fails to appreciate the difference between a *de novo* construction of a statute and a decision whether to defer to an agency's position, which does not even "*purport* to give the statute a judicial interpretation." *Mead*, *supra*, at 248 (SCALIA,

Of course, like *Mead* itself, today's novelty in belated remediation of *Mead* creates many uncertainties to bedevil the lower courts. A court's interpretation is conclusive, the Court says, only if it holds that interpretation to be "the *only permissible* reading of the statute," and not if it merely holds it to be "the *best* reading." *Ante*, at 984. Does this mean that in future statutory-construction cases involving agency-administered statutes courts must specify (presumably in dictum) which of the two they are holding? And what of the many cases decided in the past, before this dictum's requirement was established? Apparently, silence on the point means that the court's decision is subject to agency reversal: "Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction."[13] *Ante*, at 985. (I have not made, and as far as I know the Court has not made, any calculation of how many hundreds of past statutory decisions are now agency-reversible because of failure to include an "unambiguous" finding. I suspect the number is very large.) How much extra work will it entail for each court confronted with an agency-administered statute to determine whether it has reached, not only the right ("best") result, but "the only permissible" result? Is the standard for "unambiguous" under the Court's new agency-reversal rule the same as the standard for "unambiguous" under step one of *Chevron?* (If so,

---

J., dissenting). Once a court has decided upon its *de novo* construction of the statute, there no longer is a "different construction" that is "consistent with the court's holding," *ante*, at 983, and available for adoption by the agency.

[13] Suggestive of the same chaotic undermining of all prior judicial decisions that do not explicitly renounce ambiguity is the Court's explanation of why agency departure from a prior judicial decision does not amount to overruling: "[T]he agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of [ambiguous] statutes [it is charged with administering]." *Ibid.*

of course, every case that reaches step two of *Chevron* will be agency-reversible.) Does the "unambiguous" dictum produce *stare decisis* effect even when a court is *affirming*, rather than *reversing*, agency action—so that in the future the agency *must adhere* to that affirmed interpretation? If so, does the victorious agency have the right to appeal a Court of Appeals judgment in its favor, on the ground that the text in question is in fact *not* (as the Court of Appeals held) unambiguous, so the agency should be able to change its view in the future?

It is indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.[14] I would adhere to what has been the rule in the past: When a court interprets a statute without *Chevron* deference to agency views, its interpretation (whether or not asserted to rest upon an unambiguous text) is the law. I might add that it is a great mystery why any of this is relevant here. *Whatever* the *stare decisis* effect of *AT&T Corp.* v. *Portland*, 216 F. 3d 871 (CA9 2000), in the Ninth Circuit, it surely does not govern this Court's decision. And—despite the Court's peculiar, self-abnegating suggestion to the contrary, *ante*, at 985–986—the Ninth Circuit would already be obliged to

[14] Further deossification may already be on the way, as the Court has hinted that an agency construction unworthy of *Chevron* deference may be able to trump one of our statutory-construction holdings. In *Edelman* v. *Lynchburg College*, 535 U. S. 106, 114 (2002), the Court found "no need to resolve any question of deference" because the Equal Employment Opportunity Commission's rule was "the position we would adopt even if . . . we were interpreting the statute from scratch." It nevertheless refused to say whether the agency's position was "the only one permissible." *Id.*, at 114, n. 8 (internal quotation marks omitted). JUSTICE O'CONNOR appropriately "doubt[ed] that it is possible to reserve" the question whether a regulation is entitled to *Chevron* deference "while simultaneously maintaining . . . that the agency is free to change its interpretation" in the future. 535 U. S., at 122 (opinion concurring in judgment). In response, the Court cryptically said only that "not all deference is deference under *Chevron*." *Id.*, at 114, n. 8.

abandon *Portland*'s holding in the face of *this Court's* decision that the Commission's construction of "telecommunications service" is entitled to deference and is reasonable. It is a sadness that the Court should go so far out of its way to make bad law.

I respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 1020 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 6 THROUGH
SEPTEMBER 29, 2005

JUNE 6, 2005

Certiorari Granted—Vacated and Remanded

No. 04–534. HOEVENAAR *v.* LAZAROFF, WARDEN. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005). Reported below: 108 Fed. Appx. 250.

No. 04–1227. BRADLEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005). Reported below: 390 F. 3d 145.

No. 04–8465. ROSALES *v.* BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the confession of error by the Acting Solicitor General in his brief filed for the respondent on May 4, 2005. Reported below: 115 Fed. Appx. 306.

No. 04–8478. BERGER *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 980;

No. 04–8932. DIXON *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 981;

No. 04–8942. LEVY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 374 F. 3d 1023;

No. 04–9084. HOLLAND *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 982;

No. 04–9828. MILLER *v.* UNITED STATES. C. A. D. C. Cir. Reported below: 395 F. 3d 452;

No. 04–9864. CLARK *v.* UNITED STATES. C. A. 6th Cir. Reported below: 112 Fed. Appx. 481;

No. 04–9865. CESAL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 391 F. 3d 1172;

No. 04–9867. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Reported below: 118 Fed. Appx. 480;

No. 04–9916. GARCIA-MEJIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 394 F. 3d 396;

No. 04–9917. SAVAGE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 390 F. 3d 823; and

No. 04–10020. SETTLE *v.* UNITED STATES. C. A. 6th Cir. Reported below: 394 F. 3d 422. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

Certiorari Dismissed

No. 04–9760. WOODBERRY *v.* BRUCE, WARDEN, ET AL.; and

No. 04–9761. WOODBERRY *v.* BRUCE, WARDEN, ET AL. C. A. 10th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 124 Fed. Appx. 623.

Miscellaneous Orders

No. D–2389. IN RE DISBARMENT OF FITZGERALD. Disbarment entered. [For earlier order herein, see 543 U. S. 1045.]

No. D–2390. IN RE DISBARMENT OF WOOD. Disbarment entered. [For earlier order herein, see 543 U. S. 1045.]

No. D–2395. IN RE DISBARMENT OF HALL. Disbarment entered. [For earlier order herein, see 543 U. S. 1139.]

No. D–2396. IN RE DISBARMENT OF RUSSO. Disbarment entered. [For earlier order herein, see 543 U. S. 1139.]

No. D–2397. IN RE DISBARMENT OF MCCOLLOUGH. Disbarment entered. [For earlier order herein, see 543 U. S. 1139.]

No. D–2398. IN RE DISBARMENT OF OLDS. Disbarment entered. [For earlier order herein, see 543 U. S. 1139.]

No. D–2399. IN RE DISBARMENT OF NEUMAN. Disbarment entered. [For earlier order herein, see 543 U. S. 1139.]

No. D–2400. IN RE DISBARMENT OF KARTEN. Disbarment entered. [For earlier order herein, see 543 U. S. 1139.]

No. D–2401. IN RE DISBARMENT OF LAUDUMIEY. Disbarment entered. [For earlier order herein, see 543 U. S. 1139.]

No. D–2402. IN RE DISBARMENT OF SCHEURICH. Disbarment entered. [For earlier order herein, see 543 U. S. 1140.]

No. D–2403. IN RE DISBARMENT OF NORTON. Disbarment entered. [For earlier order herein, see 543 U. S. 1140.]

No. D–2404. IN RE DISBARMENT OF ETHEREDGE. Disbarment entered. [For earlier order herein, see 543 U. S. 1140.]

No. D–2405. IN RE DISBARMENT OF SENTON. Disbarment entered. [For earlier order herein, see 543 U. S. 1140.]

No. 04–1315. LONG ISLAND CARE AT HOME, LTD., ET AL. *v.* COKE. C. A. 2d Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 04–9544. IN RE SIBLEY; and
No. 04–10089. IN RE PRICE. Petitions for writs of habeas corpus denied.

No. 04–10104. IN RE JACKSON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 04–9545. IN RE ADAMS; and
No. 04–9977. IN RE ARMSTRONG ET AL. Petitions for writs of mandamus denied.

Certiorari Granted

No. 04–1332. WILL ET AL. *v.* HALLOCK ET AL. C. A. 2d Cir. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Did the Court of Appeals have jurisdiction over the interlocutory appeal of the District Court's order denying a motion to dismiss under the Federal Tort Claims Act's judgment bar, 28 U. S. C. § 2676?" Reported below: 387 F. 3d 147.

Certiorari Denied

No. 03–1404. BASS, CHIEF OF OPERATIONS OF OFFENDER MANAGEMENT SERVICES, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* MADISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 355 F. 3d 310.

No. 04–682. PATEL *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 966.

No. 04–922. NATIONAL WRESTLING COACHES ASSN. ET AL. *v.* DEPARTMENT OF EDUCATION. C. A. D. C. Cir. Certiorari denied. Reported below: 366 F. 3d 930 and 383 F. 3d 1047.

No. 04–1149. ROSE ACRE FARMS, INC. *v.* UNITED STATES; and No. 04–1311. UNITED STATES *v.* ROSE ACRE FARMS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 373 F. 3d 1177.

No. 04–1238. GIVENS *v.* ALABAMA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 381 F. 3d 1064.

No. 04–1312. SATTERLEE *v.* WASHINGTON ET AL.; RYAN *v.* MCCRAREY, A MINOR, BY AND THROUGH HIS MOTHER, CANADA; and GRAY *v.* CHIKALLA ET UX. Sup. Ct. Wash. Certiorari denied.

No. 04–1317. BOHAC *v.* WALSH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 386 F. 3d 859.

No. 04–1330. FULLER *v.* INSTINET, INC. C. A. 2d Cir. Certiorari denied. Reported below: 120 Fed. Appx. 845.

No. 04–1336. SAFIE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAFIE *v.* SAFIE ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 894 So. 2d 971.

No. 04–1338. ALL DIRECT TRAVEL SERVICES, INC., ET AL. *v.* DELTA AIR LINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 673.

No. 04–1341. MITRANO *v.* HOUSER ET AL. Sup. Ct. N. H. Certiorari denied.

No. 04–1343. MCLAURIN, INDIVIDUALLY AND ON BEHALF OF THE HEIRS OF STUBBS, DECEASED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 392 F. 3d 774.

No. 04–1347. ADKINS *v.* KASPER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 393 F. 3d 559.

No. 04–1349. ESQUIBES *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–1351. BERNAT ET AL. *v.* ALLPHIN, JUDGE, DISTRICT COURT OF UTAH, SECOND DISTRICT, ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 106 P. 3d 707.

No. 04–1357. GIBLER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 829 (first judgment); 111 Fed. Appx. 504 (second judgment).

No. 04–1370. PAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 445.

No. 04–1405. BECKETT *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 04–1424. ALCAN ALUMINUM CORP. *v.* BULLARD. C. A. 6th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 684.

No. 04–1457. BOWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 569.

No. 04–1464. ISAACKS ET AL. *v.* NEW TIMES, INC., DBA DALLAS OBSERVER, ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 146 S. W. 3d 144.

No. 04–1471. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 642.

No. 04–1476. STABILE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 856.

No. 04–7922. LIVELY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 431.

No. 04–8212. LEAVITT *v.* ARAVE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 383 F. 3d 809 and 371 F. 3d 663.

No. 04–8414. FRATTA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–8425. JEFFERSON *v.* FOUNTAIN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 382 F. 3d 1286.

No. 04–8611. FIGEL *v.* RILEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–8869. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 969.

No. 04–8872. FRANKLIN, AKA BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 997.

No. 04–9446. TURRENTINE *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 390 F. 3d 1181.

No. 04–9473. HOLT *v.* OFFICE OF THE STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 640.

No. 04–9475. CRITTEN *v.* HANCOCK ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9477. DAVIS *v.* CITY OF CINCINNATI, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 662.

No. 04–9479. YON *v.* TRANSPORT WORKERS' UNION LOCAL NO. 234 ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 869.

No. 04–9481. ANDERSON *v.* NUTTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 56.

No. 04–9482. PATRICK *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9487. BARTEL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9489. MARKS *v.* UNKNOWN ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9490. LUCAS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9491. YOUNG *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 04–9493. EARTHMAN *v.* HINES, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 206.

No. 04–9494. CAMPBELL *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–9503. DUNLAP *v.* WALKER, DEPUTY WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9507. MARSHALL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–9511. HOHMANN *v.* WOOD, DBA WOOD OBERHOLTZER. Ct. App. Ariz. Certiorari denied.

No. 04–9512. HUGGINS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 889 So. 2d 743.

No. 04–9513. SEGURA *v.* ALEXANDER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9518. JIMENEZ *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9523. PORTER *v.* MICHIGAN PAROLE BOARD ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–9539. BECKLEY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 04–9546. TALLEY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 04–9581. KESELICA *v.* STOUFFER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 142.

No. 04–9582. PALMER *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9588. COMBS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 34 Cal. 4th 821, 101 P. 3d 1007.

No. 04–9607. PETWAY *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 773.

No. 04–9622. BAHRS *v.* MCCANN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–9677. ROSE *v.* LOOS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 130 Fed. Appx. 78.

No. 04–9678. RICHARDSON *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 86 Conn. App. 32, 860 A. 2d 272.

No. 04–9712. SMITH *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 04–9713. PACE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 904 So. 2d 331.

No. 04–9724. JOHNSON *v.* MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 500.

No. 04–9727. RUTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 143.

No. 04–9747. SMITH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 863 A. 2d 1231.

No. 04–9757. WELLS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9789. GONZALEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 34 Cal. 4th 1111, 104 P. 3d 98.

No. 04–9803. HERBIN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 685.

No. 04–9815. BENFORD *v.* WILLIAMS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–9827. MCCAIN *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9839. ORTIZ *v.* ORTIZ, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9872. CRISWELL *v.* WATKINS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 576.

No. 04–9873. AGUILAR *v.* PATEL ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9897. ALLAH *v.* AL-HAFEEZ ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9925. LUCERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 918.

No. 04–9929. PAIGE *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9951. SHOUMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9953. RICHARDSON *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 125 Fed. Appx. 395.

No. 04–9957. LIGHTFOOT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9958. WRIGHT *v.* GEORGIA PACIFIC CORP. C. A. 8th Cir. Certiorari denied.

No. 04–9960. MOSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 642.

No. 04–9964. LYONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9967. DOBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 509.

No. 04–9968. BUSTOS-TORRES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 396 F. 3d 935.

No. 04–9975. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 512.

No. 04–9982. STEINMETZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9985. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 169.

No. 04–9987. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 398 F. 3d 306.

No. 04–9989. PACHECO-ESPINOSA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 352.

No. 04–9990. LLOYD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 396 F. 3d 948.

No. 04–9991. LIANGSIRIPRASERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–9992. CRAWFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 602.

No. 04–9994. MCREYNOLDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 397 F. 3d 479.

No. 04–9996. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 302.

No. 04–10006. GUERRERO-MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 599.

No. 04–10010. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 882.

No. 04–10011. FONSECA *v.* LAMANNA, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 865.

No. 04–10016. PROCTOR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 862 A. 2d 940.

No. 04–10019. SHEPARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 396 F. 3d 1116.

No. 04–10033. LOVE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–10050. VIETH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 397 F. 3d 615.

No. 04–1179. INTEGRATED TELECOM EXPRESS, INC., ET AL. *v.* NMSBPCSLDHB, L. P. C. A. 3d Cir. Motion of National Venture Capital Association for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 384 F. 3d 108.

No. 04–1318. MONTANA *v.* ANYAN ET AL. Sup. Ct. Mont. Motion of respondent Troy Klein for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 325 Mont. 245, 104 P. 3d 511.

No. 04–1392. CLARK *v.* MCLEOD. Ct. App. Colo. Motion of Pacific Justice Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 100 P. 3d 546.

Rehearing Denied

No. 04–491. DICKERSON *v.* BATES ET AL., 544 U. S. 960;
No. 04–1085. DRINKWATER *v.* PARKER, MCCAY & CRISCUOLO, 544 U. S. 976;
No. 04–8290. BOSCH *v.* KANSAS, 544 U. S. 930;
No. 04–8317. CONKLIN *v.* SCHOFIELD, WARDEN, 544 U. S. 952;
No. 04–8397. VORA *v.* CROWDER, 544 U. S. 953;
No. 04–8443. POTTS *v.* OREGON, 544 U. S. 932;
No. 04–8549. ROLLINS *v.* SMITH ET AL., 544 U. S. 954;
No. 04–8655. JAFFER *v.* NATIONAL CAUCUS & CENTER ON BLACK AGED, INC., ET AL., 544 U. S. 983;
No. 04–8790. O'NEILL *v.* RICHLAND COUNTY BOARD ET AL., 544 U. S. 966;
No. 04–8917. OUTLER *v.* ANDERSON, WARDEN, 544 U. S. 956;
No. 04–9033. ULLMAN *v.* UNITED STATES, 544 U. S. 988;
No. 04–9044. WYNTER *v.* NEW YORK, 544 U. S. 988; and
No. 04–9146. PITTMAN *v.* UNITED STATES, 544 U. S. 995. Petitions for rehearing denied.

JUNE 10, 2005

Miscellaneous Order

No. 04A1024. WISCONSIN *v.* MOECK. Application to stay the mandate of the Supreme Court of Wisconsin, case No. 2003AP2–CR, presented to JUSTICE STEVENS, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

JUNE 13, 2005

Certiorari Granted—Vacated and Remanded

No. 04–585. KLINGLER ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED *v.* DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Tennessee* v. *Lane*, 541 U. S. 509 (2004), and *Gonzales* v. *Raich*, *ante*, p. 1. Reported below: 366 F. 3d 614.

No. 04–617. UNITED STATES *v.* STEWART. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gonzales* v. *Raich*, *ante*, p. 1. Reported below: 348 F. 3d 1132.

No. 04–1210. HEMBREE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 981; and

No. 04–1362. HALE ET UX. *v.* UNITED STATES. C. A. 6th Cir. Reported below: 113 Fed. Appx. 108. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

No. 04–10018. DOCK *v.* UNITED STATES. C. A. 5th Cir. Reported below: 118 Fed. Appx. 879;

No. 04–10036. LUBOWA *v.* UNITED STATES. C. A. 6th Cir. Reported below: 118 Fed. Appx. 888;

No. 04–10141. TORRES *v.* UNITED STATES. C. A. 8th Cir. Reported below: 114 Fed. Appx. 270; and

No. 04–10173. ALEXIS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 980. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

Certiorari Dismissed

No. 04–9559. BROWN *v.* O'KEFFE ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–9612. JONES *v.* BIRKETT, WARDEN (two judgments). C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of*

Appeals, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 04A930. NIZNIK *v.* STORE-TO-DOOR, CORP., ET AL. C. A. 2d Cir. Application for temporary restraining order, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 03–10198. HALBERT *v.* MICHIGAN. Ct. App. Mich. [Certiorari granted, 543 U. S. 1042.] Motion of petitioner for leave to file supplemental brief after argument denied.

No. 04–848. DOLAN *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 3d Cir. [Certiorari granted, 544 U. S. 998.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 04–9020. YOWEL, AKA ROBINSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [544 U. S. 1016] denied.

No. 04–9737. ROGERS *v.* HUNTLEY PROJECT SCHOOL DISTRICT #24. Sup. Ct. Mont. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 5, 2005, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–10181. IN RE SERAFIN;
No. 04–10182. IN RE SLOAN; and
No. 04–10251. IN RE GREENHILL. Petitions for writs of habeas corpus denied.

No. 04–9119. IN RE CANNON;
No. 04–9621. IN RE AL-HAKIM; and
No. 04–9652. IN RE BELL. Petitions for writs of mandamus denied.

Certiorari Granted

No. 04–1186. WACHOVIA BANK, NATIONAL ASSN. *v.* SCHMIDT ET AL. C. A. 4th Cir. Certiorari granted. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 388 F. 3d 414.

Certiorari Denied

No. 03–1619. GDF REALTY INVESTMENTS, LTD., ET AL. *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 326 F. 3d 622.

No. 04–969. SAUNDERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAUNDERS, DECEASED, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 814.

No. 04–1041. KAHAWAIOLAA ET AL. *v.* NORTON, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 386 F. 3d 1271.

No. 04–1138. TARIQ-SHUAIB *v.* NEW YORK CITY HOUSING AUTHORITY, CONSTRUCTION DEPARTMENT. C. A. 2d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 11.

No. 04–1191. MORGAN ET AL. *v.* SKF USA, INC. C. A. 6th Cir. Certiorari denied. Reported below: 385 F. 3d 989.

No. 04–1208. MOSTOLLER, TRUSTEE *v.* CW CAPITAL, LLC. C. A. 6th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 425.

No. 04–1218. NATIONAL HERITAGE INSURANCE CO. *v.* UNITED STATES EX REL. BARRON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 381 F. 3d 438 and 106 Fed. Appx. 284.

No. 04–1219. NEWTON, DBA JANEW MUSIC *v.* DIAMOND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 388 F. 3d 1189.

No. 04–1240. ROYAL CARIBBEAN CRUISES LTD. *v.* HALL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 888 So. 2d 654.

No. 04–1334. CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* NIX. C. A. 11th Cir. Certiorari denied. Reported below: 393 F. 3d 1235.

No. 04–1340. CATERPILLAR INC. *v.* STURMAN INDUSTRIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 387 F. 3d 1358.

No. 04–1353. MOORE *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 8, ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–1354. KINNEY *v.* HAMILTON PARTNERS. C. A. 7th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 508.

No. 04–1358. WHITE ET VIR *v.* TSCHERTER ET AL. C. A. 8th Cir. Certiorari denied.

No. 04–1359. MARTINGALE, LLC *v.* CITY OF LOUISVILLE, KENTUCKY, ET AL. Ct. App. Ky. Certiorari denied. Reported below: 151 S. W. 3d 829.

No. 04–1377. BERKE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 04–1379. MORENO IVANOVA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MORENO REYES *v.* COLUMBIA PICTURES INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 100.

No. 04–1401. VANGUILDER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 04–1402. ESTATE OF MORELAND, DECEASED, BY MORELAND ET AL., CO-PERSONAL REPRESENTATIVES, ET AL. *v.* SPEYBROECK, INDIVIDUALLY AND AS SHERIFF OF ST. JOSEPH COUNTY, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 395 F. 3d 747.

No. 04–1420. SATALICH *v.* CITY OF LOS ANGELES, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–1428. CREDEUR ET UX. *v.* M J OIL, INC., DBA TRANS-TEXAS GAS CORP., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 585.

No. 04–1431. BENETIC ET UX., AS TRUSTEES OF THE BENETIC FAMILY TRUST DATED SEPTEMBER 22, 1993 *v.* M/Y ATHENA ALEXANDER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 757.

No. 04–1433. BAJBOR *v.* OFFICE OF COMPLIANCE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 111 Fed. Appx. 612.

No. 04–1435. ROBERTI *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 895 So. 2d 421.

No. 04–1439. KEPPLE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 151 N. H. 661, 866 A. 2d 959.

No. 04–1449. LIZZI *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. Ct. App. Md. Certiorari denied. Reported below: 384 Md. 199, 862 A. 2d 1017.

No. 04–1453. SLIP TRACK SYSTEMS, INC. *v.* METAL-LITE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 113 Fed. Appx. 930.

No. 04–1456. BOND *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 691 N. W. 2d 831.

No. 04–1484. NANCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–1494. WHITE *v.* HOBART, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 390 F. 3d 997.

No. 04–1503. CRANK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–1515. EMR NETWORK *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 391 F. 3d 269.

No. 04–8743. THORNBLAD *v.* ANDERSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 610.

No. 04–9012. VALENTINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 401 F. 3d 609.

No. 04–9085. HORNER *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 129 S. W. 3d 210.

No. 04–9094. ABU LAILA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 183.

No. 04–9097. RODRIGUEZ *v.* DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 87, 102 P. 3d 41.

No. 04–9102. NEWMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 281.

No. 04–9318. MCCARTHY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–9533. WICKEM *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–9541. STRADER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9542. THOMAS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–9543. SCOTT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–9553. STEPHENS *v.* CRIST, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9557. ASHWORTH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–9560. ARKOW *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–9567. FASSLER *v.* PENDLETON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 749.

No. 04–9570. HARRIS *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–9573. CARTER *v.* MITCHELL, SHERIFF, YORK COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 373.

No. 04–9574. CRAYTON *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9575. CHILDS *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9578. MCLITTLE *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–9583. OWENS *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 394 F. 3d 490.

No. 04–9584. RICHARDSON *v.* BOCK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9589. DISCH *v.* O'DONNELL, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9590. DAVENPORT *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 350.

No. 04–9591. RIVERS *v.* WILSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9593. DOLENZ *v.* VAIL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 143 S. W. 3d 515.

No. 04–9594. BAILEY *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9598. MIMS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–9599. DEAN *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 04–9602. TODD *v.* TODD. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 894 So. 2d 258.

No. 04–9605. PETERKA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 890 So. 2d 219.

No. 04–9613. DI NARDO ET AL. *v.* BIELUCH, SHERIFF, PALM BEACH COUNTY, FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 04–9614. CRITTENDEN *v.* CALDERON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9615. DIXON *v.* CACIOPPO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–9625. BENIGNI *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 164.

No. 04–9630. CALDWELL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. C. A. 10th Cir. Certiorari denied.

No. 04–9634. REYES SANTANA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 04–9637. MILLER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 04–9638. PETSCHL *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 692 N. W. 2d 463.

No. 04–9639. STROUT *v.* CERTAIN REAL PROPERTY LOCATED AT 105 MAKI LANE ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–9643. TAYLOR *v.* RYAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9645. MARINO *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 04–9647. NASH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 04–9651. WAULS *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 179.

No. 04–9653. SORIA *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9691. PETERSEN *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9708. CUMBERBATCH *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 894 So. 2d 246.

No. 04–9714. MENDOZA-GAUNA *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9721. LESLIE *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–9722. JONES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9736. LAKE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 04–9743. DIBARTOLO *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9759. STROPE *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 123.

No. 04–9779. JOHNSON *v.* PONDER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 901.

No. 04–9784. RODRIGUEZ *v.* CUNNINGHAM, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9804. GIBSON *v.* MOTE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–9809. LIGHTBOURNE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 889 So. 2d 71.

No. 04–9843. JOHNSON *v.* CRAWFORD, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9853. WILLIAMS *v.* RYAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 325.

No. 04–9874. MOODY *v.* DELRAY BEACH POLICE DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 473.

No. 04–9875. SPOONER *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9887. STEPHENS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 894 So. 2d 972.

No. 04–9901. MCDUFFIE *v.* NEELY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 385.

No. 04–9902. WEBB *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 313.

No. 04–9950. PAYNE *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–10013. HILDERBRAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 266.

No. 04–10034. ROCHA *v.* HOLDER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 472.

No. 04–10038. SMART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 393 F. 3d 767.

No. 04–10039. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 270.

No. 04–10044. QUINN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 130 Fed. Appx. 832.

No. 04–10048. FLEISCHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 120 Fed. Appx. 865.

No. 04–10049. FOSTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–10051. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 352.

No. 04–10059. STOKES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10060. SMALLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 516.

No. 04–10061. SAVAGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–10062. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 470.

No. 04–10067. JONES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 863 A. 2d 1225.

No. 04–10071. SUKUP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 842.

No. 04–10073. BRADLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 856 A. 2d 1157.

No. 04–10076. TRUESDALE *v.* SMITH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 573.

No. 04–10078. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 858 A. 2d 984.

No. 04–10079. TOOLASPRASHAD *v.* DEROSA, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 122 Fed. Appx. 598.

No. 04–10086. MARMOL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10090. BRIONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 390 F. 3d 610.

No. 04–10092. OUNOUSIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 886.

No. 04–10102. LEDFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 386.

No. 04–10106. ROMAIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 393 F. 3d 63.

No. 04–10133. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 396 F. 3d 579.

No. 04–10135. DANCY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–10137. BASS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 918.

No. 04–10143. GOMEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 832.

No. 04–10145. HOWARD, AKA MILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10152. TORRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10159. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 974.

No. 04–10161. GOIST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–10171. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–10174. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 133 Fed. Appx. 739.

No. 04–10175. ASHE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 641.

No. 04–10179. PALACIOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10180. BROWN *v.* CRAWFORD, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 408 F. 3d 1027.

No. 04–1020. MEDIA GENERAL, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 04–1033. NATIONAL ASSOCIATION OF BROADCASTERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 04–1036. TRIBUNE CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 04–1045. NEWSPAPER ASSOCIATION OF AMERICA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 04–1168. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* PROMETHEUS RADIO PROJECT ET AL.; and

No. 04–1177. SINCLAIR BROADCAST GROUP, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 373 F. 3d 372.

No. 04–1342. PADILLA *v.* HANFT, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG. C. A. 4th Cir. Certiorari before judgment denied.

No. 04–1367. CINTRON PARRILLA ET VIR *v.* ELI LILLY INDUSTRIES, INC., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 04–1469. CHIECO *v.* WILLIS & GEIGER ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 116 Fed. Appx. 860.

No. 04–9906. KOGER *v.* KAPLAN, INC., ET AL. C. A. 3d Cir. Certiorari before judgment denied.

Rehearing Denied

No. 04–1079. IN RE WALL, 544 U. S. 973;

No. 04–1091. AMAECHI *v.* UNIVERSITY OF KENTUCKY, COLLEGE OF EDUCATION, ET AL., 544 U. S. 976;

No. 04–1101. ZURLA *v.* CITY OF DAYTONA BEACH, FLORIDA, ET AL., 544 U. S. 976;

No. 04–1204. UNITED STATES EX REL. GRAVES ET AL. *v.* ITT EDUCATIONAL SERVICES, INC., ET AL.; and UNITED STATES EX REL. BOWMAN *v.* EDUCATION AMERICA, INC., ET AL., 544 U. S. 978;

No. 04–7698. GUZEK *v.* OREGON, 544 U. S. 979;

No. 04–8302. AHMED *v.* OHIO, 544 U. S. 952;

No. 04–8417. FARR *v.* TENNESSEE, 544 U. S. 931;

No. 04–8475. KELLEY *v.* WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL., 544 U. S. 965;

No. 04–8511. TREECE *v.* ORLEANS PARISH CITY GOVERNMENT JUDICIAL BRANCH ET AL., 544 U. S. 966;

No. 04–8778. ELLIS *v.* EMERY, TRUSTEE, ET AL., 544 U. S. 1002;

No. 04–8832. SCOTT *v.* UNITED STATES, 544 U. S. 955;

No. 04–8864. WIDNER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 544 U. S. 987;

No. 04–8940. IN RE NZONGOLA, 544 U. S. 998; and

No. 04–9257. BOWERS *v.* UNITED STATES, 544 U. S. 995. Petitions for rehearing denied.

JUNE 16, 2005

Dismissals Under Rule 46

No. 04–10109. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 129 Fed. Appx. 601.

No. 04–10190. IN RE DEEB. Petition for writ of mandamus dismissed under this Court's Rule 46.

JUNE 20, 2005

Certiorari Granted—Vacated and Remanded

No. 04–609. HIGHTOWER *v.* SCHOFIELD, WARDEN. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded

for further consideration in light of *Miller-El* v. *Dretke*, *ante*, p. 231. Reported below: 365 F. 3d 1008.

No. 04–1390. UNITED STATES *v.* SMITH. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gonzales* v. *Raich*, *ante*, p. 1. Reported below: 402 F. 3d 1303.

No. 04–6176. ALLEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *California*, *ante*, p. 162.

No. 04–8323. HOLBROOK *v.* UNITED STATES. C. A. 4th Cir. Reported below: 368 F. 3d 415;

No. 04–10091. TEEPLES *v.* UNITED STATES. C. A. 9th Cir. Reported below: 111 Fed. Appx. 900;

No. 04–10103. JONES *v.* UNITED STATES. C. A. 7th Cir. Reported below: 389 F. 3d 753;

No. 04–10127. FOX *v.* UNITED STATES. C. A. 1st Cir. Reported below: 393 F. 3d 52; and

No. 04–10253. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Reported below: 389 F. 3d 424. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

Miscellaneous Orders

No. D–2334. IN RE DISBARMENT OF LOCKENVITZ. Disbarment entered. [For earlier order herein, see 536 U. S. 975.]

No. D–2406. IN RE DISBARMENT OF POOLE. Disbarment entered. [For earlier order herein, see 543 U. S. 1140.]

No. D–2407. IN RE DISBARMENT OF SILVIA. Disbarment entered. [For earlier order herein, see 543 U. S. 1140.]

No. D–2408. IN RE DISBARMENT OF PIPPEN. Disbarment entered. [For earlier order herein, see 543 U. S. 1140.]

No. D–2409. IN RE DISBARMENT OF RICKARD. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2410. IN RE DISBARMENT OF ASHIRU. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2411. IN RE DISBARMENT OF BOYD. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2412. IN RE DISBARMENT OF MOORMAN. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2413. IN RE DISBARMENT OF EPSTEIN. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2414. IN RE DISBARMENT OF TANNER. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2415. IN RE DISBARMENT OF GROSS. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2416. IN RE DISBARMENT OF BUDA. Disbarment entered. [For earlier order herein, see 543 U. S. 1141.]

No. D–2417. IN RE DISBARMENT OF SPENCER. Disbarment entered. [For earlier order herein, see 543 U. S. 1142.]

No. D–2419. IN RE DISBARMENT OF WHITAKER. Disbarment entered. [For earlier order herein, see 543 U. S. 1142.]

No. 04M74. AMADASUN *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 04–721. LAMARQUE, WARDEN *v.* CHAVIS. C. A. 9th Cir. [Certiorari granted, 544 U. S. 1017.] Motion of respondent for appointment of counsel granted. Peter K. Stris, Esq., of Los Angeles, Cal., is appointed to serve as counsel for respondent in this case.

No. 04–10294. IN RE BILDERBACK; and

No. 04–10374. IN RE FONSECA. Petitions for writs of habeas corpus denied.

No. 04–9730. IN RE SIMMONS-GOFF; and

No. 04–9744. IN RE CLAY. Petitions for writs of mandamus denied.

Certiorari Granted

No. 04–1264. BUCKEYE CHECK CASHING, INC. *v.* CARDEGNA ET AL. Sup. Ct. Fla. Certiorari granted. Reported below: 894 So. 2d 860.

No. 04–1329. ILLINOIS TOOL WORKS INC. ET AL. *v.* INDEPENDENT INK, INC. C. A. Fed. Cir. Motions of American Bar Association, American Intellectual Property Law Association, Pfizer Inc., and Intellectual Property Owners Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 396 F. 3d 1342.

Certiorari Denied

No. 03–10031. ENGLISH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 886 So. 2d 181.

No. 03–10045. COULTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 345 Ill. App. 3d 81, 799 N. E. 2d 708.

No. 03–10700. REYNOSO *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 04–293. HONEYWELL INTERNATIONAL INC. ET AL. *v.* HAMILTON SUNDSTRAND CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 370 F. 3d 1131.

No. 04–992. D. T. B., A MINOR CHILD, BY HIS NEXT FRIEND, O'CALLAGHAN, ET AL. *v.* FARMER, FORMER ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 446.

No. 04–1106. FOLDEN ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 379 F. 3d 1344.

No. 04–1115. SEATTLE HOUSING AND RESOURCE EFFORT *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 379 F. 3d 716.

No. 04–1148. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 398 F. 3d 1291.

No. 04–1213. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA *v.* BANUELOS. C. A. 9th Cir. Certiorari denied. Reported below: 382 F. 3d 897.

No. 04–1230. WRIGHT ELECTRIC, INC. *v.* OUELLETTE ET AL. Ct. App. Minn. Certiorari denied. Reported below: 686 N. W. 2d 313.

No. 04–1257. KETTENBACH *v.* DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF DEMOULAS AND NEXT FRIEND OF DEMOULAS, ET AL. App. Ct. Mass. Certiorari denied. Reported below: 62 Mass. App. 1107, 816 N. E. 2d 559.

No. 04–1369. EDDINGS ET AL. *v.* JUNKER. C. A. Fed. Cir. Certiorari denied. Reported below: 396 F. 3d 1359.

No. 04–1374. CITY OF HEMET, CALIFORNIA, ET AL. *v.* SMITH. C. A. 9th Cir. Certiorari denied. Reported below: 394 F. 3d 689.

No. 04–1385. MANION *v.* NAGIN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 394 F. 3d 1062.

No. 04–1389. OXLEY *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 844 So. 2d 420.

No. 04–1394. BUREAU *v.* SYNTEGRA (USA), INC., ET AL. Ct. App. Minn. Certiorari denied.

No. 04–1395. ELLIS *v.* LIBERTY LIFE ASSURANCE COMPANY OF BOSTON. C. A. 5th Cir. Certiorari denied. Reported below: 394 F. 3d 262.

No. 04–1397. GERBER ET AL. *v.* AGYEMAN. C. A. 9th Cir. Certiorari denied. Reported below: 390 F. 3d 1101.

No. 04–1398. GOODMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 152 S. W. 3d 67.

No. 04–1400. FEDERAL WAY SCHOOL DISTRICT *v.* M. L., A MINOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 394 F. 3d 634.

No. 04–1416. CITY OF CLEVELAND, OHIO *v.* BECK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 390 F. 3d 912.

No. 04–1422. JIMENEZ SANCHEZ *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–1443. MADRID *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 151.

No. 04–1444. BREWER *v.* SCHALANSKY, SECRETARY, KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. Sup. Ct. Kan. Certiorari denied. Reported below: 278 Kan. 734, 102 P. 3d 1145.

No. 04–1446. CARUSO ET VIR *v.* MORRIS. Ct. App. La., 4th Cir. Certiorari denied.

No. 04–1448. ROGERS ET AL. *v.* CITY OF SAN ANTONIO, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 392 F. 3d 758.

No. 04–1454. BASSIOUNI *v.* CENTRAL INTELLIGENCE AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 392 F. 3d 244.

No. 04–1458. CHICAGO BRAND INDUSTRIAL, INC. *v.* MITUTOYO CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 122 Fed. Appx. 470.

No. 04–1460. HAYES *v.* GENESIS HEALTH VENTURES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 119 Fed. Appx. 427.

No. 04–1463. HOWARD *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 568.

No. 04–1472. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. C. A. D. C. Cir. Certiorari denied.

No. 04–1483. MALIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 339.

No. 04–1500. HOFF *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 122 Fed. Appx. 512.

No. 04–1533. TRENKLER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 04–1560. HONEYWELL INTERNATIONAL INC. *v.* INTERFAITH COMMUNITY ORGANIZATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 399 F. 3d 248.

No. 04–6903. FIELDS *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 04–6974. MORALES-DE JESUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 372 F. 3d 6.

No. 04–7537. FITZPATRICK *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 321, 810 N. E. 2d 927.

No. 04–7843. CLARK *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 896 So. 2d 584.

No. 04–7939. RODRIGUEZ-HERRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 972.

No. 04–8117. FORDE *v.* CLARK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 93.

No. 04–8606. TYSON *v.* COOPER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 34.

No. 04–8664. COLBURN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 297.

No. 04–8823. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 377 F. 3d 1313.

No. 04–8969. GRAY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 887 So. 2d 158.

No. 04–8991. HUGHES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 892 So. 2d 203.

No. 04–9167. KIRCHOFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 387 F. 3d 748.

No. 04–9172. BRANDON P., A JUVENILE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 387 F. 3d 969.

No. 04–9248. CERNA-SALGUERO, AKA REYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 399 F. 3d 887.

No. 04–9654. QUINTANA *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 73.

No. 04–9658. HAMILTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–9664. FIELDS *v.* CRAWFORD, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 67.

No. 04–9679. KRASSNER *v.* WHITING. C. A. 3d Cir. Certiorari denied. Reported below: 391 F. 3d 540.

No. 04–9680. WIEBELHAUS *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 04–9682. WALKER *v.* COVINGTON. Ct. App. N. Y. Certiorari denied. Reported below: 3 N. Y. 3d 287, 819 N. E. 2d 1025.

No. 04–9684. WARREN *v.* BRUCE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 204.

No. 04–9686. WILLIAMS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9693. SZABO *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9696. ALI *v.* HOUSING AUTHORITY OF THE CITY OF PATERSON. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 864.

No. 04–9706. SMITH *v.* AKERLIND. Ct. App. Mich. Certiorari denied.

No. 04–9709. COLE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 152 S. W. 3d 267.

No. 04–9711. MATHIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 865.

No. 04–9716. CLOUTIER *v.* COSTCO WHOLESALE CORP. C. A. 1st Cir. Certiorari denied. Reported below: 390 F. 3d 126.

No. 04–9718. CARLESS *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9720. SHELBY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9723. JOHNSON *v.* BERKELEY COUNTY SHERIFF'S DEPARTMENT AND DETENTION CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 647.

No. 04–9725. MOORE *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9732. BATTY *v.* TENNIS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9733. WOOD *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 362 S. C. 135, 607 S. E. 2d 57.

No. 04–9734. ROSE *v.* MCMURRAY ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9735. WELLS *v.* 19TH JUDICIAL DISTRICT COURT OF LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–9739. ROSE *v.* ASPER ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9751. BROWN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9755. KING *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9756. JACKSON *v.* WILSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 04–9758. JONES *v.* BITNER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 866.

No. 04–9766. PAGE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 12 App. Div. 3d 622, 785 N. Y. S. 2d 113.

No. 04–9793. GARRAWAY *v.* FEDERAL BUREAU OF PRISONS. C. A. 10th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 962.

No. 04–9819. WANGUNHARDJO *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 610.

No. 04–9829. DAY *v.* FARWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9858. CURTO *v.* EDMONDSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 392 F. 3d 502.

No. 04–9862. ANDERSON *v.* PARKER, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–9905. WEST *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 1112, 868 N. E. 2d 1110.

No. 04–9908. MENDOZA MALDONADO *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 221.

No. 04–9920. MEAD *v.* OREGON; MEAD *v.* MURGO, JUDGE, CIRCUIT COURT OF WASHINGTON COUNTY, ET AL.; and MEAD *v.* KOHL, JUDGE, CIRCUIT COURT OF WASHINGTON COUNTY, ET AL. Sup. Ct. Ore. Certiorari denied.

No. 04–9930. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1038, —— N. E. 2d ——.

No. 04–9945. JAMERSON *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 888 So. 2d 49.

No. 04–9970. HICKS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 04–10022. MIRANDA *v.* LEIBACH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 394 F. 3d 984.

No. 04–10055. BROWN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 860 A. 2d 1125.

No. 04–10112. VESEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 395 F. 3d 861.

No. 04–10113. BERRY *v.* PAINTER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 660.

No. 04–10185. BETTS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 34 Cal. 4th 1039, 103 P. 3d 883.

No. 04–10193. ST. JOHN-THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10201. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 869 A. 2d 369.

No. 04–10204. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–10205. VANCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 544.

No. 04–10208. PRI-HAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–10211. MATHIESON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 599.

No. 04–10212. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 236.

No. 04–10213. SANCHEZ-LUNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 338.

No. 04–10218. HORNADAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 392 F. 3d 1306.

No. 04–10219. GARCIA-CASTILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 385.

No. 04–10220. OCHOA GUZMAN *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 04–10222. GIBSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–10228. CUREAUX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 826.

No. 04–10229. DEEB *v.* SANDERS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–10230. EDWARDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 398 F. 3d 713.

No. 04–10233. MCDONALD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 481.

No. 04–10235. DOMINGUEZ LIZANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10237. GOMEZ-MARTINEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–10242. HUGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10243. TYREE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 123 Fed. Appx. 508.

No. 04–10252. BLUE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 427.

No. 04–10257. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–10270. LAMBROS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 404 F. 3d 1034.

No. 04–10296. BROWN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–1381. SPRINT COMMUNICATIONS CO., L. P., ET AL. *v.* SMITH ET AL. C. A. 7th Cir. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 387 F. 3d 612.

No. 04–1461. HANAS *v.* MICHIGAN. Cir. Ct. Genesee County, Mich. Motion of American Jewish Congress for leave to file a brief as *amicus curiae* granted. Certiorari denied.

Rehearing Denied

No. 03–725. PASQUANTINO ET AL. *v.* UNITED STATES, 544 U. S. 349;

No. 03–9627. PACE *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., 544 U. S. 408;

No. 04–902. MURPHY *v.* METROPOLITAN TRANSIT AUTHORITY, 544 U. S. 905;

No. 04–1008. CHEATHAM *v.* UNITED STATES, 544 U. S. 906;

No. 04–1163. STEPHENS *v.* UNION CARBIDE CORP. ET AL., 544 U. S. 1018;

No. 04–8578. CORBIN *v.* BLADEN COUNTY CHILD SUPPORT AGENCY ET AL., 544 U. S. 981;

No. 04–8787. BLANEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 544 U. S. 1002;

No. 04–8795. RILEY *v.* GEORGIA, 544 U. S. 1002;

No. 04–9186. EAK *v.* MECHLING, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, 544 U. S. 1006; and

No. 04–9212. COTNEY *v.* UNITED STATES, 544 U. S. 1013. Petitions for rehearing denied.

JUNE 21, 2005

Miscellaneous Order

No. 04A1060. DAVIS, SUPERINTENDENT, INDIANA STATE PRISON *v.* LAMBERT. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Seventh Circuit on June 17, 2005, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

JUNE 23, 2005

Dismissal Under Rule 46

No. 04–10150. HEARN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari dismissed under this Court's Rule 46. Reported below: 349 Ill. App. 3d 1050, —— N. E. 2d ——.

JUNE 24, 2005

Dismissal Under Rule 46

No. 04–1406. BAUTISTA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BAUTISTA, ET AL. *v.* STAR CRUISES ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 396 F. 3d 1289.

JUNE 27, 2005

Certiorari Granted—Vacated and Remanded

No. 04–1532. RICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005). Reported below: 114 Fed. Appx. 692.

No. 04–6530. SNYDER *v.* LOUISIANA. Sup. Ct. La. Reported below: 874 So. 2d 739; and

No. 04–9879. KANDIES *v.* POLK, WARDEN. C. A. 4th Cir. Reported below: 385 F. 3d 457. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Miller-El* v. *Dretke*, *ante*, p. 231.

No. 04–10245. TORRES-AMADOR *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 321;

No. 04–10259. HARRISON, AKA GREEN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 987; and

No. 04–10274. BAUSSAN *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

Certiorari Dismissed

No. 04–9807. GARRETT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–10387. OKPALA *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 04M75. TORNS *v.* MISSISSIPPI ET AL.;

No. 04M76. MCMORRIS *v.* WERNER ET AL.; and

No. 04M77. SMITH ET UX. *v.* TOWN OF MENDON, NEW YORK, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04–373. MARYLAND *v.* BLAKE. Ct. App. Md. [Certiorari granted, 544 U. S. 973.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* out of time granted.

No. 04–944. ARBAUGH *v.* Y & H CORP., DBA THE MOONLIGHT CAFE. C. A. 5th Cir. [Certiorari granted, 544 U. S. 1031.] Mo-

tion of petitioner to dispense with printing the joint appendix granted.

No. 04–10351. SPIELVOGEL *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 18, 2005, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–1410. IN RE JONES; and

No. 04–1413. IN RE REYAD. Petitions for writs of mandamus denied.

Certiorari Granted

No. 03–1559. BANK OF CHINA, NEW YORK BRANCH *v.* NBM L. L. C. ET AL. C. A. 2d Cir. Certiorari granted limited to the following question: "Did the Court of Appeals for the Second Circuit err when it held that civil Racketeer Influenced and Corrupt Organizations Act plaintiffs alleging mail and wire fraud as predicate acts must establish 'reasonable reliance' under 18 U. S. C. § 1964(c)?" Reported below: 359 F. 3d 171 and 89 Fed. Appx. 751.

No. 04–805. TEXACO INC. *v.* DAGHER ET AL.; and

No. 04–814. SHELL OIL CO. *v.* DAGHER ET AL. C. A. 9th Cir. Motions of Washington Legal Foundation, Visa U. S. A. Inc. et al., Chamber of Commerce of the United States of America et al., and Antitrust Scholars for leave to file briefs as *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 369 F. 3d 1108.

No. 04–1131. WHITMAN *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 382 F. 3d 938.

No. 04–1360. HUDSON *v.* MICHIGAN. Ct. App. Mich. Certiorari granted.

No. 04–1495. HARTMAN ET AL. *v.* MOORE. C. A. D. C. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 388 F. 3d 871.

Certiorari Denied

No. 03–1202. HEWLETT-PACKARD COMPANY EMPLOYEE BENEFITS ORGANIZATION INCOME PROTECTION PLAN *v.* JEBIAN. C. A. 9th Cir. Certiorari denied. Reported below: 349 F. 3d 1098.

No. 04–31. MCFARLING *v.* MONSANTO CO. C. A. Fed. Cir. Certiorari denied. Reported below: 363 F. 3d 1336.

No. 04–165. COMSTOCK RESOURCES, INC., ET AL. *v.* KENNARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 363 F. 3d 1039.

No. 04–983. ARPAIO, SHERIFF, MARICOPA COUNTY, ARIZONA *v.* DEMERY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 378 F. 3d 1020.

No. 04–1252. AMERICAN PELAGIC FISHING CO., L. P. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 379 F. 3d 1363.

No. 04–1291. EL-SHIFA PHARMACEUTICAL INDUSTRIES CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 378 F. 3d 1346.

No. 04–1297. VERANDA BEACH, LLC *v.* RLI INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 638.

No. 04–1314. OLSON *v.* TEAMSTERS LOCAL NO. 70, BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 275.

No. 04–1363. UNITED STATES EX REL. GRYNBERG *v.* PRAXAIR, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 389 F. 3d 1038.

No. 04–1372. SICROFF *v.* JETT. C. A. 9th Cir. Certiorari denied. Reported below: 401 F. 3d 1101.

No. 04–1419. COGGER ET UX. *v.* BECKER COUNTY, MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 690 N. W. 2d 739.

No. 04–1426. BAUR *v.* PENNSYLVANIA STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF LABOR AND INDUSTRY). Commw. Ct. Pa. Certiorari denied.

No. 04–1429. WEIR *v.* KELLY, COMMISSIONER, NEW YORK CITY POLICE DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 4 App. Div. 3d 160, 772 N. Y. S. 2d 38.

No. 04–1432. BROWN, JOINT TENANT TRUSTEE *v.* MONTGOMERY COUNTY, PENNSYLVANIA, ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 845 A. 2d 268.

No. 04–1442. PIPPINS *v.* TANGIPAHOA PARISH COUNCIL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 48.

No. 04–1447. SIMMONS *v.* NEVADA LANDING PARTNERSHIP ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–1451. KINNARD *v.* RUTHERFORD COUNTY BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 85.

No. 04–1479. FORNARO *v.* GANNON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 124 Fed. Appx. 8.

No. 04–1489. STROBEL *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 164 N. C. App. 310, 596 S. E. 2d 249.

No. 04–1504. CARPENTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–1505. DAVIS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 217 W. Va. 93, 616 S. E. 2d 89.

No. 04–1514. WH–T. V. BROADCASTING CORP. *v.* ZENITH ELECTRONICS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 395 F. 3d 416.

No. 04–1516. CROTTS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 104 Ohio St. 3d 432, 820 N. E. 2d 302.

No. 04–1531. STEINER *v.* POTTER, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 622.

No. 04–1537. JERNIGAN *v.* CITY OF TULSA, OKLAHOMA, EX REL. PALMER, CHIEF OF POLICE, CITY OF TULSA, OKLAHOMA. Ct. Civ. App. Okla. Certiorari denied.

No. 04–1545. JOHNSON *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 521.

No. 04–1546. BOSCH *v.* CITY OF BISMARCK, NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 691 N. W. 2d 260.

No. 04–1559. RATES TECHNOLOGY INC. *v.* NORTEL NETWORKS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 399 F. 3d 1302.

No. 04–1562. MANGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–1567. MOSKOWITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–1570. SUBRAMANIAN *v.* QAD INC. ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–1584. FRYE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 402 F. 3d 1123.

No. 04–5659. FEARS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 575 Pa. 281, 836 A. 2d 52.

No. 04–5960. ASH *v.* ASH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 684.

No. 04–8306. ROOT *v.* PAYNE, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 845.

No. 04–8459. CURRIE *v.* CORSINI, SUPERINTENDENT, BAY STATE CORRECTIONAL CENTER, ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–8762. HALL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 160 S. W. 3d 24.

No. 04–8773. LEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 374 F. 3d 637.

No. 04–8982. DYSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 848 A. 2d 603.

No. 04–9098. GOMES LAGES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9274. HARRIS *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9282. RIVERA-MARTINEZ *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 389 F. 3d 207.

No. 04–9286. LACKEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 260.

No. 04–9413. PEOPLES *v.* CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 377 F. 3d 1208.

No. 04–9745. NERO *v.* HURLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9746. MARIAN *v.* SUPERIOR COURT OF CALIFORNIA, VENTURA COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–9762. CRUZ *v.* HERNANDEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9768. MARCICKY *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9770. BECK *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 04–9772. THOMPSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 147 S. W. 3d 22.

No. 04–9773. ENGRAM *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 360 Ark. 140.

No. 04–9778. MCKAY *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 892 So. 2d 1039.

No. 04–9785. SOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9788. BARKER *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9790. HILL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9791. FIELDS *v.* SOUTHWEST AIRLINES CO. C. A. 5th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 378.

No. 04–9792. GRAY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 888 So. 2d 213.

No. 04–9794. GESFORD *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 534.

No. 04–9796. HARDISTY *v.* YMCA OF GREATER SEATTLE ET AL. Sup. Ct. Wash. Certiorari denied.

No. 04–9798. HERNANDEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 528.

No. 04–9801. PORTER *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 140 Idaho 780, 102 P. 3d 1099.

No. 04–9802. GARRETT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9805. FIGEL *v.* MONROE ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–9806. GARRETT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9808. MITLEIDER *v.* HALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 391 F. 3d 1039.

No. 04–9812. LOVE *v.* RYAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9813. CARRANZA *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 199.

No. 04–9820. TURNER *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 209.

No. 04–9821. WRIGHT *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 151 S. W. 3d 836.

No. 04–9822. WILSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 598.

No. 04–9823. MCMILLEN *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 04–9824. LOCKHART *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 325.

No. 04–9825. ZORUMSKI *v.* BRAXTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 941.

No. 04–9826. DRAUGHN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 940.

No. 04–9830. STARCHER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9832. ROSE *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 395 F. 3d 1108.

No. 04–9837. STERLING *v.* WEST, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9838. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 892 So. 2d 1047.

No. 04–9840. ORTEGA *v.* CALIFORNIA ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–9841. SKINNER *v.* PETTUS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 41.

No. 04–9847. DENBOW *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–9851. MULDROW *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9854. LEONARD *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 04–9857. LAUER *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 04–9859. MCCRAY *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9860. MORRIS *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9863. RUDDICK *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 04–9869. ROBINSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–9870. HARRIS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 181 N. J. 391, 859 A. 2d 364.

No. 04–9871. DANIEL *v.* MILLS, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–9876. CONRAD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9883. COLIDA *v.* SHARP ELECTRONICS CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 125 Fed. Appx. 993.

No. 04–9894. BUCHANAN *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 777.

No. 04–9914. STALEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 160 S. W. 3d 56.

No. 04–9940. KHOTESOUVAN ET AL. *v.* CLARK, FIELD OFFICE DIRECTOR, SEATTLE, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 386 F. 3d 1298.

No. 04–9948. PURKERSON *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9978. BLACKERT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 892 So. 2d 482.

No. 04–9979. CASEY *v.* MOORE. C. A. 9th Cir. Certiorari denied. Reported below: 386 F. 3d 896.

No. 04–9984. SAIZ *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 392 F. 3d 1166.

No. 04–10003. HOOD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 158 S. W. 3d 480.

No. 04–10007. QIANG HUANG *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–10037. KIRBY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 819 N. E. 2d 909.

No. 04–10065. CARTER *v.* TEXAS DEPARTMENT OF HEALTH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 577.

No. 04–10097. PORTER *v.* PORTER. Ct. App. N. Y. Certiorari denied. Reported below: 4 N. Y. 3d 776, 825 N. E. 2d 1090.

No. 04–10105. MADDEN *v.* HIRSCH ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–10108. DUMAS *v.* DUMOLT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 323.

No. 04–10123. FARMER *v.* POWERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–10130. HOWARD *v.* WEST VIRGINIA. Cir. Ct. Pocahontas County, W. Va. Certiorari denied.

No. 04–10176. AYINGONO, AKA HERNANDEZ MORETA *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–10178. PINEDA SALGADO *v.* FEDERAL CORRECTIONAL INSTITUTION AT MCKEAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–10188. MILLER *v.* HEDRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–10200. STAFFORD *v.* BROWN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 769.

No. 04–10227. FLUELLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10238. RAMIREZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–10262. CRISTOBAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 874.

No. 04–10276. TULLOCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 785.

No. 04–10277. SHIMEK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–10287. MAJID *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–10292. PODLOG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 117 Fed. Appx. 805.

No. 04–10293. BARNETT *v.* BLEDSOE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–10314. LARRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 127.

No. 04–10322. ABDULLAH *v.* HEDRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 392 F. 3d 957.

No. 04–10324. CHAVARRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 599.

No. 04–10327. FALLEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 869 A. 2d 368.

No. 04–10328. FOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 320.

No. 04–10330. GRIFFIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 804 A. 2d 1.

No. 04–10332. HUTMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–10333. ISMEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 694.

No. 04–10334. WARE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10335. WOODRUFF *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–10338. MASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 131 Fed. Appx. 440.

No. 04–10343. ADKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–10350. INTROCASO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–10352. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–10365. AGUAYO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–10368. WARFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–10371. BURGOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–10373. GUSTAVE *v.* STANSBERRY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 513.

No. 04–10375. GRIMES, AKA GREENWOOD *v.* WETZEL, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 986.

No. 04–10377. HOLTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 598.

No. 04–10382. SIMMONS *v.* GRAYER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 599.

No. 04–10385. TYLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–10388. ORTEGA-RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–10393. DE LOS SANTOS-MORA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 979.

No. 04–10398. KUCERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 269.

No. 04–10399. JIMENEZ-MUCHACA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10777. KEUP *v.* WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES ET AL. Sup. Ct. Wis. Motion of Heidi Singer, Personal Representative of the Estate of Althea Keup, for substitution as petitioner in place of Althea Keup, deceased, granted. Certiorari denied. Reported below: 269 Wis. 2d 59, 675 N. W. 2d 755.

No. 04–621. PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY *v.* DYNEGY POWER MARKETING, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 384 F. 3d 756.

No. 04–994. LUCENT TECHNOLOGIES, INC. *v.* FELIX ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 387 F. 3d 1146.

No. 04–1196. KELLEY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of Honorable J. Gibbons et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 377 F. 3d 1317.

No. 04–1430. JACKSON *v.* DELAWARE RIVER AND BAY AUTHORITY. C. A. 3d Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. Reported below: 114 Fed. Appx. 511.

No. 04–1441. PATRICK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. *v.* DEFOY. C. A. 3d

Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 393 F. 3d 439.

No. 04–1499. FLORIDA *v.* BUSBY. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 894 So. 2d 88.

No. 04–1507. MILLER *v.* UNITED STATES; and

No. 04–1508. COOPER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 397 F. 3d 964.

No. 04–9498. BLANKENSHIP *v.* HEAD, WARDEN. Sup. Ct. Ga. Certiorari denied. JUSTICE BREYER would grant the petition for writ of certiorari.

No. 04–10255. WALLACE *v.* UNITED STATES. C. A. 3d Cir. Certiorari before judgment denied.

Rehearing Denied

No. 04–294. FOUNTAIN *v.* UNITED STATES, 544 U. S. 1017;

No. 04–8034. OSTER *v.* SUTTON ET AL., 544 U. S. 979;

No. 04–8477. MORALES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 544 U. S. 965;

No. 04–8651. PRICE *v.* REID, SUPERINTENDENT, CENTENNIAL CORRECTIONAL FACILITY, ET AL., 544 U. S. 983;

No. 04–8784. MORRIS *v.* COURT OF APPEALS OF NORTH CAROLINA ET AL., 544 U. S. 1002;

No. 04–8802. JUSTICE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 544 U. S. 1003;

No. 04–8858. YOUNG *v.* SULLIVAN, WARDEN, 544 U. S. 1020;

No. 04–8910. APPLEBY *v.* BUTLER, WARDEN, 544 U. S. 1021;

No. 04–8999. PEREA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. (two judgments), 544 U. S. 1005;

No. 04–9041. CHRISTAKIS *v.* MCMAHON, 544 U. S. 1023;

No. 04–9144. PARKS *v.* UNITED STATES, 544 U. S. 1023; and

No. 04–9443. SAID ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 544 U. S. 1025. Petitions for rehearing denied.

No. 04–8498. CARY *v.* SUPREME COURT OF VIRGINIA, 544 U. S. 965. Motion for leave to file petition for rehearing denied.

JUNE 28, 2005

Dismissal Under Rule 46

No. 04–1525. ELECTRICAL & ELECTRONICS LTD. *v.* PHILIPS DOMESTIC APPLIANCES AND PERSONAL CARE B. V. ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 391 F. 3d 871.

Certiorari Granted—Vacated and Remanded

No. 04–986. HOWTON, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION *v.* EARL X. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mayle* v. *Felix*, *ante*, p. 644. Reported below: 109 Fed. Appx. 162.

No. 04–1247. BELL, WARDEN *v.* ABDUR'RAHMAN. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gonzalez* v. *Crosby*, *ante*, p. 524. Reported below: 392 F. 3d 174.

No. 04–6572. HARRIS *v.* MICHIGAN. Sup. Ct. Mich. Reported below: 470 Mich. 882, 681 N. W. 2d 653; and

No. 04–7125. SIMMONS *v.* METRISH, WARDEN. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Halbert* v. *Michigan*, *ante*, p. 605.

Certiorari Granted

No. 04–52. RICE, WARDEN, ET AL. *v.* COLLINS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 365 F. 3d 667.

No. 04–1244. SCHEIDLER ET AL. *v.* NATIONAL ORGANIZATION FOR WOMEN, INC.; and

No. 04–1352. OPERATION RESCUE *v.* NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. C. A. 7th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 91 Fed. Appx. 510.

No. 04–8990. HOUSE *v.* BELL, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 386 F. 3d 668.

Certiorari Denied

No. 03–1629. KIM'S AUTO & TRUCK SERVICE, INC. *v.* CITY OF TOLEDO, OHIO, ET AL. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 03–1661. JOHNSON ET AL. *v.* BAKER ET AL.; and
No. 04–65. ADAMS COUNTY/OHIO VALLEY SCHOOL BOARD *v.* BAKER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 104.

No. 03–1698. HARLAN COUNTY, KENTUCKY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 354 F. 3d 438.

No. 04–841. DEWEESE, JUDGE, COURT OF COMMON PLEAS, RICHLAND COUNTY, OHIO *v.* AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC. C. A. 6th Cir. Certiorari denied. Reported below: 375 F. 3d 484.

No. 04–924. LAFARGE CORP. *v.* OLDEN ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 6th Cir. Certiorari denied. Reported below: 383 F. 3d 495.

No. 04–1052. TOWN OF GREAT FALLS, SOUTH CAROLINA, ET AL. *v.* WYNNE. C. A. 4th Cir. Certiorari denied. Reported below: 376 F. 3d 292.

No. 04–7365. BELARDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8861. WRIGHT *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9204. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 250.

JULY 11, 2005

Miscellaneous Order

No. 05A7 (05–5044). LOVITT *v.* TRUE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of

certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JULY 12, 2005

Certiorari Denied

No. 05–5242 (05A46). CONKLIN *v.* TERRY, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition. Reported below: 279 Ga. 557, 616 S. E. 2d 453.

JULY 19, 2005

Miscellaneous Order

No. 05A60. SALLAHDIN, AKA PENNINGTON *v.* OKLAHOMA. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied.

JULY 22, 2005

Certiorari Denied

No. 05–5197 (05A38). WOLFE *v.* TRUE, WARDEN. Sup. Ct. Va. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

JULY 28, 2005

Miscellaneous Order

No. 05–5527 (05A102). IN RE MARTINEZ. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application and this petition.

Certiorari Denied

No. 05–5522 (05A101). MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application and this petition.

AUGUST 1, 2005

Rehearing Denied

No. 04–922. NATIONAL WRESTLING COACHES ASSN. ET AL. *v.* DEPARTMENT OF EDUCATION, *ante*, p. 1104;

No. 04–1038. SINGH *v.* GONZALES, ATTORNEY GENERAL, 544 U. S. 1031;

No. 04–1076. DEYERBERG *v.* WOODWARD ET AL., 544 U. S. 949;

No. 04–1151. PITTS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 544 U. S. 1018;

No. 04–1180. DUGAS *v.* CLARON CORP., 544 U. S. 1032;

No. 04–1194. HARLEY *v.* ADLER ET AL., 544 U. S. 1018;

No. 04–1202. UNITED STATES EX REL. GAY ET AL. *v.* LINCOLN TECHNICAL INSTITUTE INC., 544 U. S. 1032;

No. 04–1205. CLANCY *v.* AT&T CORP.; and CLANCY *v.* COMCAST CORP. ET AL., 544 U. S. 1032;

No. 04–1210. HEMBREE *v.* UNITED STATES, *ante*, p. 1112;

No. 04–1211. FLOYD *v.* MARYLAND, 544 U. S. 1033;

No. 04–1306. MOLLINGER-WILSON ET VIR *v.* QUIZNO'S FRANCHISE CO., 544 U. S. 1034;

No. 04–1337. PEARSON *v.* UNITED STATES, 544 U. S. 1034;

No. 04–1357. GIBLER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY (two judgments), *ante*, p. 1105;

No. 04–6120. PEARL *v.* CASON, WARDEN, 544 U. S. 1062;

No. 04–7058. PAUL *v.* FOX ET AL., 543 U. S. 1065;

No. 04–7514. DAVIS ET AL. *v.* UNITED STATES CONGRESS, 544 U. S. 1034;

No. 04–7694. CARUSO *v.* TRUSTEE OF ST. JUDE CHILDREN'S RESEARCH HOSPITAL ET AL., 543 U. S. 1163;

No. 04–8018. CLAY *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 544 U. S. 1035;

No. 04–8230. OBI *v.* TEXAS (two judgments), 544 U. S. 951;

No. 04–8310. RAMIREZ-ROBLES *v.* UNITED STATES, 544 U. S. 1035;

No. 04–8415. FREMONDE *v.* CITY OF NEW YORK, NEW YORK, ET AL., 544 U. S. 963;

No. 04–8608. GENTRY *v.* BUTLER, WARDEN, 544 U. S. 982;

No. 04–8734. HENDRICKS *v.* RUSHTON, WARDEN, ET AL., 544 U. S. 1001;

No. 04–8801. JACKSON *v.* CITY OF SIKESTON POLICE DEPARTMENT, 544 U. S. 1003;

No. 04–8804. KWIATKOWSKI *v.* J. P. MORGAN CHASE & CO., 544 U. S. 1003;

No. 04–8843. SANCHO *v.* RAMIREZ ET AL., 544 U. S. 1019;

No. 04–8848. DUARTE *v.* SNEDEKER, WARDEN, 544 U. S. 1019;

No. 04–8859. WANSING *v.* SMELSER, WARDEN, ET AL., 544 U. S. 1020;

No. 04–8886. WASHINGTON *v.* AMERICAN DRUG STORES, INC., 544 U. S. 1020;

No. 04–8897. LAMAR-HOGAN *v.* GEORGIA DEPARTMENT OF LABOR, 544 U. S. 1021;

No. 04–8936. WALLS *v.* SECURITY ENFORCEMENT BUREAU OF NEW YORK, INC., ET AL., 544 U. S. 1021;

No. 04–8948. EYAJAN *v.* SMITH ET AL., 544 U. S. 1022;

No. 04–8951. SMITH *v.* VIRGINIA, 544 U. S. 1004;

No. 04–8953. RAY *v.* NEW JERSEY, 544 U. S. 1022;

No. 04–8977. WATERS *v.* SCHWARTZ, WARDEN, 544 U. S. 1022;

No. 04–8989. VORA *v.* STRASSBURGER, MCKENNA, MESSER, SHILOBOD & GUTNICK, 544 U. S. 1035;

No. 04–9017. THOMAS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 544 U. S. 1036;

No. 04–9023. BASCOM *v.* FRIED ET AL., 544 U. S. 1036;

No. 04–9030. MENDOZA *v.* LANE ET AL., 544 U. S. 1036;

No. 04–9053. HICKS *v.* COLLINS, WARDEN, 544 U. S. 1037;

No. 04–9180. WOODS *v.* RENICO, WARDEN, 544 U. S. 1039;

No. 04–9207. ROWE *v.* ROBERT HALF INTERNATIONAL, INC., ET AL., 544 U. S. 1051;

No. 04–9221. DUNLAP *v.* HATHAWAY, JUDGE, CIRCUIT COURT OF MICHIGAN, THIRD CIRCUIT, 544 U. S. 1051;

No. 04–9289. MASKO *v.* UNITED STATES, 544 U. S. 1006;

No. 04–9290. KING *v.* THOMAS, WARDEN, 544 U. S. 1052;

No. 04–9323. JONES *v.* SALEEBY ET AL., 544 U. S. 1053;

No. 04–9337. STERLING *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 544 U. S. 1053;

No. 04–9347. PLCH *v.* COPLAN, WARDEN, 544 U. S. 1053;

No. 04–9360. ALLEN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 544 U. S. 1040;

No. 04–9376. WINGATE *v.* UNITED STATES, 544 U. S. 1008;

No. 04–9378. WARFIELD *v.* SOUTH DAKOTA, 544 U. S. 1040;

No. 04–9400. JALOMO LOPEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 544 U. S. 1064;

No. 04–9452. BALLENTINE *v.* ILLINOIS STATE POLICE, 544 U. S. 1040;

No. 04–9457. ALLEN *v.* MAXWELL-HODGES ET AL., 544 U. S. 1065;

No. 04–9471. BUNCH *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, 544 U. S. 1065;

No. 04–9499. ATHANASIADES *v.* EDELMAN, 544 U. S. 1025;

No. 04–9511. HOHMANN *v.* WOOD, DBA WOOD OBERHOLTZER, *ante*, p. 1107;

No. 04–9523. PORTER *v.* MICHIGAN PAROLE BOARD ET AL., *ante*, p. 1107;

No. 04–9565. HUMMINGWAY, AKA GOLDENSTEIN *v.* UNITED STATES, 544 U. S. 1041;

No. 04–9636. STRATTON *v.* UNITED STATES, 544 U. S. 1042;

No. 04–9662. EVANS ET AL. *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., 544 U. S. 1066;

No. 04–9670. BLOM *v.* UNITED STATES, 544 U. S. 1043;

No. 04–9715. IN RE PEDRAZA, 544 U. S. 1031;

No. 04–9849. IN RE WILLIAMS, 544 U. S. 1048;

No. 04–9861. BUCULEI *v.* UNITED STATES, 544 U. S. 1067; and

No. 04–9874. MOODY *v.* DELRAY BEACH POLICE DEPARTMENT ET AL., *ante*, p. 1120. Petitions for rehearing denied.

No. 03–10812. WILLIAMS *v.* UNITED STATES, 543 U. S. 852;

No. 04–8544. WALKER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, ET AL., 544 U. S. 933; and

No. 04–9497. VOLIS *v.* UNITED STATES, 544 U. S. 1025. Motions for leave to file petitions for rehearing denied.

AUGUST 4, 2005

Certiorari Denied

No. 05–5619 (05A129). SIBLEY *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 04–9544 (05A125). IN RE SIBLEY, *ante*, p. 1103. Application for stay of execution of sentence of death, presented to JUS-

TICE KENNEDY, and by him referred to the Court, denied. Petition for rehearing denied.

AUGUST 8, 2005

Dismissal Under Rule 46

No. 05–68. CITY OF WARREN, MICHIGAN *v.* UNITED STATES FIRE INSURANCE CO. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 87 Fed. Appx. 485.

AUGUST 10, 2005

Dismissal Under Rule 46

No. 04–10369. IN RE DAIGNEAULT. Petition for writ of mandamus dismissed under this Court's Rule 46.

Certiorari Denied

No. 05–5684 (05A142). STERLING *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

AUGUST 11, 2005

Miscellaneous Order

No. 05–5722 (05A145). IN RE TURRENTINE. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 22, 2005

Miscellaneous Orders

No. 04A989. SAVAGE *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 04A990. CLAYTON *v.* RUNNELS, WARDEN. Application for certificate of appealability, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. 04–698. SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, SCHAFFER ET VIR, ET AL. *v.* WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL. C. A. 4th Cir. [Certiorari granted, 543 U. S. 1145.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–1084. GONZALES, ATTORNEY GENERAL, ET AL. *v.* O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL ET AL. C. A. 10th Cir. [Certiorari granted, 544 U. S. 973.] Motion of respondents to strike portions of petitioners' brief on the merits denied.

No. 04–1144. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE *v.* PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND ET AL. C. A. 1st Cir. [Certiorari granted, 544 U. S. 1048.] Motion of Alan Ernest to represent children unborn and born alive denied.

No. 04–1186. WACHOVIA BANK, NATIONAL ASSN. *v.* SCHMIDT ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1113.] Motion of the parties to dispense with printing the joint appendix granted. JUSTICE THOMAS took no part in the consideration or decision of this motion.

No. 04–1244. SCHEIDLER ET AL. *v.* NATIONAL ORGANIZATION FOR WOMEN, INC.; and

No. 04–1352. OPERATION RESCUE *v.* NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1151.] Motion of petitioners to dispense with printing the joint appendix granted.

Rehearing Denied

No. 03–10045. COULTER *v.* ILLINOIS, *ante*, p. 1127;

No. 04–108. KELO ET AL. *v.* CITY OF NEW LONDON, CONNECTICUT, ET AL., *ante*, p. 469;

No. 04–169. GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES EX REL. WILSON, *ante*, p. 409;

No. 04–514. BELL, WARDEN *v.* THOMPSON, *ante*, p. 794;

No. 04–563. MAYLE, WARDEN *v.* FELIX, *ante*, p. 644;

No. 04–603. GRABLE & SONS METAL PRODUCTS, INC. *v.* DARUE ENGINEERING & MANUFACTURING, *ante*, p. 308;

No. 04–1379. MORENO IVANOVA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MORENO REYES *v.* COLUMBIA PICTURES INDUSTRIES, INC., *ante*, p. 1115;

No. 04–6506. REYNOLDS *v.* WHITE, WARDEN, 543 U. S. 1008;

No. 04–6626. ROBREDO *v.* PALISADES MEDICAL CENTER, NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM, 543 U. S. 982;

No. 04–8414. FRATTA *v.* TEXAS, *ante*, p. 1105;

No. 04–8861. WRIGHT *v.* MITCHEM, WARDEN, ET AL., *ante*, p. 1152;

No. 04–8869. WARD *v.* UNITED STATES, *ante*, p. 1105;

No. 04–9018. WITHERSPOON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 544 U. S. 1036;

No. 04–9091. HORNE *v.* SMITH, WARDEN, 544 U. S. 1038;

No. 04–9145. MUNAWWAR *v.* WOODWEST REALTY, 544 U. S. 1039;

No. 04–9413. PEOPLES *v.* CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1142;

No. 04–9500. BRAMWELL *v.* COMPTON, WARDEN, 544 U. S. 1025;

No. 04–9553. STEPHENS *v.* CRIST, ATTORNEY GENERAL OF FLORIDA, ET AL., *ante*, p. 1117;

No. 04–9581. KESELICA *v.* STOUFFER, WARDEN, ET AL., *ante*, p. 1107;

No. 04–9602. TODD *v.* TODD, *ante*, p. 1118;

No. 04–9607. PETWAY *v.* VIRGINIA ET AL., *ante*, p. 1107;

No. 04–9630. CALDWELL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, *ante*, p. 1119;

No. 04–9643. TAYLOR *v.* RYAN, ACTING WARDEN, *ante*, p. 1119;

No. 04–9645. MARINO *v.* TEXAS, *ante*, p. 1119;

No. 04–9706. SMITH *v.* AKERLIND, *ante*, p. 1131;

No. 04–9718. CARLESS *v.* BERGHUIS, WARDEN, *ante*, p. 1131;

No. 04–9730. IN RE SIMMONS-GOFF, *ante*, p. 1126;

No. 04–9735. WELLS *v.* 19TH JUDICIAL DISTRICT COURT OF LOUISIANA ET AL., *ante*, p. 1132;

No. 04–9773. ENGRAM *v.* ARKANSAS, *ante*, p. 1142;

No. 04–9840. ORTEGA *v.* CALIFORNIA ET AL., *ante*, p. 1144;

No. 04–9863. RUDDICK *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, *ante*, p. 1145;

No. 04–9925. LUCERO *v.* UNITED STATES, *ante*, p. 1109;

No. 04–9961. IN RE PRICE, 544 U. S. 1059;

No. 04–9978. BLACKERT *v.* FLORIDA, *ante*, p. 1146;

No. 04–9982. STEINMETZ *v.* UNITED STATES, *ante*, p. 1109;

No. 04–10065. CARTER *v.* TEXAS DEPARTMENT OF HEALTH ET AL., *ante*, p. 1146;

No. 04–10113. BERRY *v.* PAINTER, WARDEN, ET AL., *ante*, p. 1133;

No. 04–10123. FARMER *v.* POWERS, WARDEN, ET AL., *ante*, p. 1146;

No. 04–10130. HOWARD *v.* WEST VIRGINIA, *ante*, p. 1146;

No. 04–10179. PALACIOS *v.* UNITED STATES, *ante*, p. 1123;

No. 04–10259. HARRISON, AKA GREEN *v.* UNITED STATES, *ante*, p. 1137;

No. 04–10350. INTROCASO *v.* UNITED STATES, *ante*, p. 1148; and

No. 04–10352. HAMILTON *v.* UNITED STATES, *ante*, p. 1148. Petitions for rehearing denied.

No. 04–1367. CINTRON PARRILLA ET VIR *v.* ELI LILLY INDUSTRIES, INC., ET AL., *ante*, p. 1123. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

AUGUST 23, 2005

Certiorari Denied

No. 04–10166 (05A170). SHIELDS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 122 Fed. Appx. 133.

AUGUST 26, 2005

Certiorari Denied

No. 05–5572 (05A169). JACKSON *v.* TRUE, WARDEN. Sup. Ct. Va. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

AUGUST 30, 2005

Miscellaneous Order

No. 05A206. JOHNSTON *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Application for

stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

SEPTEMBER 2, 2005

Miscellaneous Orders

No. 03–1238. IBP, INC. *v.* ALVAREZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 9th Cir.; and

No. 04–66. TUM ET AL. *v.* BARBER FOODS, INC., DBA BARBER FOODS. C. A. 1st Cir. [Certiorari granted, 543 U. S. 1144.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of IBP, Inc., and Barber Foods, Inc., for divided argument denied. Motion of respondents Alvarez et al. for divided argument denied.

No. 04–473. GARCETTI ET AL. *v.* CEBALLOS. C. A. 9th Cir. [Certiorari granted, 543 U. S. 1186.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–597. UNITHERM FOOD SYSTEMS, INC. *v.* SWIFT-ECKRICH, INC., DBA CONAGRA REFRIGERATED FOODS. C. A. Fed. Cir. [Certiorari granted, 543 U. S. 1186.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–623. GONZALES, ATTORNEY GENERAL, ET AL. *v.* OREGON ET AL. C. A. 9th Cir. [Certiorari granted, 543 U. S. 1145.] Motion of respondents John Doe and Don W. James for additional time for argument and for divided argument denied.

No. 04–631. WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE *v.* PRAIRIE BAND POTAWATOMI NATION. C. A. 10th Cir. [Certiorari granted, 543 U. S. 1186.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–905. VOLVO TRUCKS NORTH AMERICA, INC. *v.* REEDER-SIMCO GMC, INC. C. A. 8th Cir. [Certiorari granted, 544 U. S. 903.] Motion of the Solicitor General for leave to partic-

ipate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–1140. MARTIN ET UX. *v.* FRANKLIN CAPITAL CORP. ET AL. C. A. 10th Cir. [Certiorari granted, 544 U. S. 998.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 04–1329. ILLINOIS TOOL WORKS INC. ET AL. *v.* INDEPENDENT INK, INC. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 1127.] Motion of Motion Picture Association of America, Inc., et al. for leave to file a brief as *amici curiae* granted.

Rehearing Denied

No. 04–5960. ASH *v.* ASH ET AL., *ante*, p. 1141;

No. 04–8323. HOLBROOK *v.* UNITED STATES, *ante*, p. 1125;

No. 04–9126. HAIRSTON *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 544 U. S. 989;

No. 04–9622. BAHRS *v.* MCCANN, WARDEN, *ante*, p. 1107;

No. 04–9743. DIBARTOLO *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1120;

No. 04–9794. GESFORD *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1143;

No. 04–9823. MCMILLEN *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY, *ante*, p. 1144;

No. 04–9847. DENBOW *v.* TEXAS, *ante*, p. 1144;

No. 04–9873. AGUILAR *v.* PATEL ET AL., *ante*, p. 1108;

No. 04–9948. PURKERSON *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1146;

No. 04–10324. CHAVARRY *v.* UNITED STATES, *ante*, p. 1147; and

No. 04–10365. AGUAYO *v.* UNITED STATES, *ante*, p. 1148. Petitions for rehearing denied.

No. 04–8531. IN RE ABSALON, 544 U. S. 973. Motion for leave to file petition for rehearing denied.

SEPTEMBER 7, 2005

Miscellaneous Order. (For Court's order making allotment of Justices, see *ante*, p. VI.)

SEPTEMBER 8, 2005

Miscellaneous Orders

No. 05A229. CORZINE, UNITED STATES SENATOR, ET AL. *v.* 2005 DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION ET AL. C. A. 3d Cir. Application for stay and/or preliminary injunction, presented to JUSTICE SOUTER, and by him referred to the Court, denied.

No. 05A230. NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. 8th Cir. Application for injunction, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

SEPTEMBER 12, 2005

Miscellaneous Order

No. 04A1010. BECKLEY *v.* UNITED STATES. Application for bail, addressed to JUSTICE SOUTER and referred to the Court, denied.

SEPTEMBER 14, 2005

Miscellaneous Order

No. 05–6301 (05A247). IN RE NEWTON. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 05–6302 (05A248). NEWTON *v.* TEXAS (two judgments). Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 20, 2005

Dismissal Under Rule 46

No. 04–1690. UNITED STATES *v.* BARNETT. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 398 F. 3d 516.

SEPTEMBER 22, 2005

Certiorari Denied

No. 05–6517 (05A271). PEOPLES *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 26, 2005

Miscellaneous Order

No. 05A273. HICKEY *v.* UNITED STATES. C. A. 9th Cir. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

SEPTEMBER 27, 2005

Probable Jurisdiction Noted

No. 04–1581. WISCONSIN RIGHT TO LIFE, INC. *v.* FEDERAL ELECTION COMMISSION. Appeal from D. C. D. C. Probable jurisdiction noted.

Certiorari Granted

No. 04–1324. DAY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motions of Professor John H. Blume et al. and National Association of Criminal Defense Lawyers for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 391 F. 3d 1192.

No. 04–1327. HOLMES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari granted limited to Question 1 presented by the petition. Reported below: 361 S. C. 333, 605 S. E. 2d 19.

No. 04–1371. MERRILL LYNCH, PIERCE, FENNER & SMITH INC. *v.* DABIT. C. A. 2d Cir. Motion of Securities Industry Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 395 F. 3d 25.

No. 04–1414. UNITED STATES *v.* GRUBBS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 377 F. 3d 1072 and 389 F. 3d 1306.

No. 04–1477. JONES *v.* FLOWERS ET AL. Sup. Ct. Ark. Certiorari granted. Reported below: 359 Ark. 443.

No. 04–1506. ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. *v.* AHLBORN. C. A. 8th Cir. Certiorari granted. Reported below: 397 F. 3d 620.

No. 04–1528. RANDALL ET AL. *v.* SORRELL ET AL.;
No. 04–1530. VERMONT REPUBLICAN STATE COMMITTEE ET AL. *v.* SORRELL ET AL.; and
No. 04–1697. SORRELL ET AL. *v.* RANDALL ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 382 F. 3d 91.

No. 04–1544. MARSHALL *v.* MARSHALL. C. A. 9th Cir. Certiorari granted. Reported below: 392 F. 3d 1118.

No. 04–1704. DAIMLERCHRYSLER CORP. ET AL. *v.* CUNO ET AL.; and
No. 04–1724. WILKINS, TAX COMMISSIONER FOR THE STATE OF OHIO, ET AL. *v.* CUNO ET AL. C. A. 6th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: "Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. §5733.33?" Reported below: 386 F. 3d 738.

No. 04–9728. SAMSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

SEPTEMBER 29, 2005

Dismissal Under Rule 46

No. 05–5565. DAVIS *v.* BROWN, WARDEN. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 384 F. 3d 628.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 2002, 2003, AND 2004

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2002	2003	2004	2002	2003	2004	2002	2003	2004	2002	2003	2004
Number of cases on dockets	7	6	4	2,190	2,058	2,041	7,209	6,818	6,543	9,406	8,882	8,588
Number disposed of during term	1	2	0	1,853	1,758	1,687	6,483	6,030	5,814	8,337	7,790	7,501
Number remaining on dockets	6	4	4	337	300	354	726	788	729	1,069	1,092	1,087

	TERMS		
	2002	2003	2004
Cases argued during term	84	*91	87
Number disposed of by full opinions	79	*89	85
Number disposed of by per curiam opinions	5	2	2
Number set for reargument	0	0	0
Cases granted review this term	91	87	80
Cases reviewed and decided without oral argument	66	52	826
Total cases to be available for argument at outset of following term	*52	47	41

* Includes 02–1674, 02–1675, 02–1676, 02–1702, 02–1727, 02–1733, 02–1734, 02–1740, 02–1747, 02–1753, 02–1755, 02–1756 argued September 8, 2003.

JUNE 28, 2005

INDEX

ABUSE OF DISCRETION. See **Courts of Appeals.**

ADMINISTRATIVE PROCEDURE ACT. See **Communications Act of 1934.**

AGGRAVATION EVIDENCE. See **Constitutional Law,** VII.

ALASKA. See **Federal-State Relations.**

ALEXANDER ARCHIPELAGO. See **Federal-State Relations.**

AMERICANS WITH DISABILITIES ACT OF 1990.

Title III—Foreign-flag cruise ships.—Fifth Circuit's decision holding Title III inapplicable to foreign-flag cruise ships in U. S. waters is reversed, and case is remanded. Spector v. Norwegian Cruise Line Ltd., p. 119.

AMOUNT-IN-CONTROVERSY REQUIREMENT. See **Jurisdiction,** 1.

ANNUAL TRUCKING FEES. See **Constitutional Law,** II.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996. See **Habeas Corpus,** 2, 3.

APPOINTED APPELLATE COUNSEL. See **Constitutional Law,** III, 1; V, 1.

ARTICLE III. See **Jurisdiction,** 1.

ASSISTANCE OF COUNSEL. See **Constitutional Law,** V, 1; VII.

***BATSON* CLAIM.** See **Constitutional Law,** V, 2, 3.

BREACH OF CONTRACT. See **Immunity from Suit.**

BROADBAND CABLE MODEM COMPANIES. See **Communications Act of 1934.**

BUREAU OF RECLAMATION. See **Immunity from Suit.**

CABLE MODEM COMPANIES. See **Communications Act of 1934.**

CALIFORNIA. See **Constitutional Law,** I; V, 3.

CAPITAL MURDER. See **Constitutional Law,** VII; **Habeas Corpus,** 1.

CAPITOL GROUNDS TEN COMMANDMENTS DISPLAY. See **Constitutional Law,** VI, 2.

CASE OR CONTROVERSY. See **Jurisdiction,** 1.

CERTIORARI. See **Courts of Appeals.**

COMMERCE CLAUSE. See **Constitutional Law,** I; II.

COMMON-CARRIER REGULATION. See **Communications Act of 1934.**

COMMUNICATIONS ACT OF 1934.

Common-carrier regulation—Coverage of broadband cable modem companies.—Federal Communications Commission's conclusion that broadband cable modem companies are exempt from mandatory common-carrier regulation is a lawful construction of Act under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, and Administrative Procedure Act. National Cable & Telecommunications Assn. v. Brand X Internet Services, p. 967.

COMPASSIONATE USE ACT. See **Constitutional Law,** I.

CONDEMNATION. See **Constitutional Law,** IV.

CONSTITUTIONAL LAW.

I. Commerce Clause.

California law—Medical marijuana.—Congress' Commerce Clause power includes power to prohibit local cultivation and use of marijuana for medicinal purposes as permitted by California's Compassionate Use Act. Gonzales v. Raich, p. 1.

II. Discrimination Against Interstate Commerce.

1. *Trucks engaged in interstate hauling—Pre-emption of state fee.*—Title 49 U. S. C. § 14504 does not pre-empt an annual $100 fee Michigan imposes on each Michigan license-plated truck operating entirely in interstate commerce. Mid-Con Freight Systems, Inc. v. Michigan Pub. Serv. Comm'n, p. 440.

2. *Trucks engaged in interstate hauling—State fee.*—Michigan's flat annual fee on trucks engaged in intrastate commercial hauling does not violate dormant Commerce Clause when applied to trucks engaging in both interstate and intrastate hauling. American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n, p. 429.

CONSTITUTIONAL LAW—Continued.

III. Due Process.

1. *Appointment of appellate counsel—Indigents convicted on pleas of guilty or nolo contendere.*—Fourteenth Amendment's Due Process Clause requires appointment of counsel for defendants convicted on pleas who seek access to first-tier review in Michigan Court of Appeals. Halbert v. Michigan, p. 605.

2. *Prisons—Inmate classification.*—Procedures by which Ohio classifies prisoners for placement at its "Supermax" prison provide inmates with sufficient protection to comply with Fourteenth Amendment. Wilkinson v. Austin, p. 209.

3. *Property interest—Restraining order enforcement.*—Respondent did not, for Due Process Clause purposes, have a property interest in police enforcement of her restraining order against her husband, who had taken, and later murdered, their children. Castle Rock v. Gonzales, p. 748.

IV. Eminent Domain.

Public use—Condemnation of property—Development plan to revitalize city.—Respondent city's proposed condemnation of petitioners' property for use under a development plan designed to revitalize city qualifies as a "public use" within meaning of Fifth Amendment's Takings Clause. Kelo v. New London, p. 469.

V. Equal Protection of the Laws.

1. *Appointment of appellate counsel—Indigents convicted on pleas of guilty or nolo contendere.*—Fourteenth Amendment's Equal Protection Clause requires appointment of counsel for defendants convicted on pleas of guilty or *nolo contendere* who seek first-tier review in Michigan Court of Appeals. Halbert v. Michigan, p. 605.

2. *Exclusion of jurors because of race—Peremptory strikes.*—Petitioner is entitled to prevail on his claim that prosecutors' peremptory strikes of potential jurors in his capital murder trial were based on race in violation of Fourteenth Amendment, and is thus entitled to federal habeas relief. Miller-El v. Dretke, p. 231.

3. *Exclusion of jurors because of race—Proving purposeful discrimination.*—California's "more likely than not" standard is an inappropriate yardstick by which to measure sufficiency of a prima facie case of purposeful discrimination in jury selection under *Batson* v. *Kentucky*, 476 U. S. 79. Johnson v. California, p. 162.

VI. Establishment of Religion.

1. *Ten Commandments—Courthouse display.*—A determination of petitioner counties' purpose in posting Ten Commandments on their courthouse walls is a sound basis for ruling on, and may be dispositive of, Establishment Clause challenges to postings; evaluation of counties' claim of

CONSTITUTIONAL LAW—Continued.

secular purpose for their displays' final versions should take account of displays' evolution and development. McCreary County v. American Civil Liberties Union of Ky., p. 844.

2. *Ten Commandments—Display on state capitol grounds.*—Fifth Circuit's decision that Establishment Clause allows display of a monument inscribed with Ten Commandments on Texas State Capitol grounds is affirmed. Van Orden v. Perry, p. 677.

VII. Right to Counsel.

Effective assistance—Evaluating mitigation and aggravation evidence.—Even when a capital defendant and his family have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows prosecution will probably rely on as aggravation evidence at trial's sentencing phase. Rompilla v. Beard, p. 374.

COPYRIGHTS.

Infringement—Distributor's liability for third-party use.—Distributor who dispenses a device with object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for resulting acts of infringement by third parties using device, regardless of device's lawful uses. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., p. 913.

COURTHOUSE TEN COMMANDMENTS DISPLAY. See **Constitutional Law,** VI, 1.

COURTS OF APPEALS.

Stay of mandate—Abuse of discretion.—Assuming that Federal Rule of Appellate Procedure 41 authorizes a court of appeals to stay a mandate following a denial of certiorari and that a court may stay its mandate without entering an order, Sixth Circuit's decision to do so here was an abuse of discretion. Bell v. Thompson, p. 794.

CRIMINAL LAW. See **Constitutional Law,** VII.

CRUISE SHIPS. See **Americans with Disabilities Act of 1990.**

DEATH SENTENCE. See **Constitutional Law,** VII; **Habeas Corpus,** 1.

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law,** II.

DISCRIMINATION BASED ON DISABILITY. See **Americans with Disabilities Act of 1990.**

DISCRIMINATION BASED ON RACE. See **Constitutional Law,** V, 2, 3.

DISCRIMINATION IN JURY SELECTION. See **Constitutional Law,** V, 2, 3.

DISTRIBUTOR'S LIABILITY FOR THIRD-PARTY USE. See **Copyrights.**

DIVERSITY JURISDICTION. See **Jurisdiction,** 1.

DORMANT COMMERCE CLAUSE. See **Constitutional Law,** II, 2.

DRUGS. See **Constitutional Law,** I; **Patent Law.**

DUE PROCESS. See **Constitutional Law,** III.

EMINENT DOMAIN. See **Constitutional Law,** IV.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** V.

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** VI.

FALSE CLAIMS ACT.

Retaliation action—Statute of limitations.—Because FCA's statute of limitations, 31 U. S. C. §3731(b)(1), does not govern §3730(h) actions brought by an individual retaliated against by his employer for assisting an FCA investigation or proceeding, most closely analogous state statute of limitations applies. Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, p. 409.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction,** 2.

FEDERAL RULES OF APPELLATE PROCEDURE. See **Courts of Appeals.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Habeas Corpus,** 3.

FEDERAL-STATE RELATIONS. See also **Constitutional Law,** I; II; **Jurisdiction,** 2.

Submerged land ownership.—Court overrules Alaska's exceptions to Special Master's recommendations that United States has title to pockets and enclaves of submerged lands underlying waters in Alexander Archipelago and title to submerged lands underlying waters of Glacier Bay. Alaska v. United States, p. 75.

FEDERAL TAXES. See **Jurisdiction,** 2.

FIFTH AMENDMENT. See **Constitutional Law,** IV; V, 2, 3; **Full Faith and Credit Statute.**

FIRST AMENDMENT. See **Constitutional Law,** VI.

FLAT FEES ON TRUCKING. See **Constitutional Law,** II.

FOOD AND DRUG ADMINISTRATION. See **Patent Law.**

FOREIGN-FLAG CRUISE SHIPS. See **Americans with Disabilities Act of 1990.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** III; V, 1.

FULL FAITH AND CREDIT STATUTE.

Exceptions—Takings claim.—This Court will not create an exception to full faith and credit statute, 28 U. S. C. § 1738, in order to provide a federal forum for litigants seeking to advance Fifth Amendment takings claims. San Remo Hotel, L. P. v. City and County of San Francisco, p. 323.

GLACIER BAY. See **Federal-State Relations.**

GUILTY PLEA. See **Habeas Corpus,** 1.

HABEAS CORPUS. See also **Constitutional Law,** V, 2.

1. *Guilty plea and sentencing decision—Prosecution's inconsistent theory in accomplice's case.*—Sixth Circuit erred in granting respondent habeas relief on grounds that his guilty plea was not knowing, voluntary, and intelligent and that it was void because State, in a later trial of respondent's accomplice, pursued a theory inconsistent with one advanced in respondent's case; but case is remanded for that court to resolve in first instance merits of inconsistency claim as it relates to respondent's death sentence. Bradshaw v. Stumpf, p. 175.

2. *Limitations period—Relation back of amended petition.*—A state prisoner's amendment to his federal habeas petition does not relate back to his timely original petition (and thereby avoid 1-year limitations period imposed by Antiterrorism and Effective Death Penalty Act of 1996) when amendment asserts a new ground for relief supported by facts different in time and type from those set forth in original petition. Mayle v. Felix, p. 644.

3. *Motion for relief from habeas judgment—Successive habeas petitions.*—Because petitioner's Federal Rule of Civil Procedure 60(b) motion challenged only District Court's previous ruling on Antiterrorism and Effective Death Penalty Act of 1996's statute of limitations, it is not equivalent to a successive habeas petition and can be ruled upon by that court without precertification by Eleventh Circuit; however, under proper Rule 60(b) standards, District Court correctly denied relief here. Gonzalez v. Crosby, p. 524.

4. *Statute of limitations—Date limitations period begins to run.*—Title 28 U. S. C. § 2255, ¶ 6(3)'s 1-year limitation period begins to run on date on which this Court "initially recognized" right asserted in an appli-

HABEAS CORPUS—Continued.
cant's motion for habeas relief, not date on which that right was made retroactive. Dodd v. United States, p. 353.

IMMUNITY FROM SUIT.
Reclamation Reform Act of 1982—Waiver of immunity.—In enacting 43 U. S. C. § 390uu, Congress did not waive United States' sovereign immunity from a breach of contract suit brought by petitioners, who purchase water from a local water district that receives its water under a contract with United States Bureau of Reclamation. Orff v. United States, p. 596.

INDIGENT DEFENDANTS. See **Constitutional Law,** III, 1; V, 1.

INEFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law,** VII.

INFRINGEMENT. See **Copyrights; Patent Law.**

INMATE CLASSIFICATIONS. See **Constitutional Law,** III, 2.

INTERNET. See **Copyrights.**

INTERSTATE COMMERCE. See **Constitutional Law,** II.

JURISDICTION.
1. *Diversity action—Supplemental jurisdiction—Amount-in-controversy requirement.*—Where other elements of jurisdiction are present and at least one named plaintiff in an action satisfies 28 U. S. C. § 1332(a)'s amount-in-controversy requirement, § 1367 authorizes supplemental jurisdiction over claims of other plaintiffs in same Article III case or controversy, even if those claims are for less than requisite amount. Exxon Mobil Corp. v. Allapattah Services, Inc., p. 546.

2. *Removal to federal court—Federal-question jurisdiction—State quiet title action.*—National interest in providing a federal forum for federal tax litigation is sufficiently substantial to support exercise of federal-question jurisdiction over petitioner's state quiet title action on removal to federal court. Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., p. 308.

JURY SELECTION. See **Constitutional Law,** V, 2, 3.

KENTUCKY. See **Constitutional Law,** VI, 1.

KNOWING, VOLUNTARY, AND INTELLIGENT GUILTY PLEA. See **Habeas Corpus,** 1.

LIABILITY FOR THIRD-PARTY INFRINGEMENT. See **Copyrights.**

LIMITATIONS PERIODS. See **False Claims Act; Habeas Corpus,** 2, 4.

MANDATE WITHHELD. See **Courts of Appeals.**

MARIJUANA. See **Constitutional Law,** I.

MEDICAL MARIJUANA. See **Constitutional Law,** I.

MICHIGAN. See **Constitutional Law,** II; III, 1; V, 1.

MITIGATION EVIDENCE. See **Constitutional Law,** VII.

MOTIONS FOR RELIEF FROM JUDGMENT. See **Habeas Corpus,** 3.

MURDER. See **Constitutional Law,** VII; **Habeas Corpus,** 1.

OHIO. See **Constitutional Law,** III, 2.

PATENT LAW.

Infringement—Patented compound's use in preclinical studies.—Title 35 U. S. C. § 271(e)(1) exempts from patent infringement use of a patented compound in preclinical studies at least as long as there is a reasonable basis to believe that compound tested could be subject of a Food and Drug Administration submission and experiments will produce types of information relevant to an investigational new drug application or a new drug application made to FDA. Merck KGaA v. Integra Lifesciences I, Ltd., p. 193.

POLICE ENFORCEMENT OF RESTRAINING ORDERS. See **Constitutional Law,** III, 3.

PRECLINICAL STUDIES. See **Patent Law.**

PRE-EMPTION. See **Constitutional Law,** II, 1.

PRISONERS' RIGHTS. See **Constitutional Law,** III, 2.

PROPERTY INTEREST FOR DUE PROCESS PURPOSES. See **Constitutional Law,** III, 3.

PROPERTY RIGHTS. See **Constitutional Law,** IV.

QUIET TITLE ACTIONS. See **Jurisdiction,** 2.

RACE DISCRIMINATION. See **Constitutional Law,** V, 2, 3.

RECLAMATION REFORM ACT OF 1982. See **Immunity from Suit.**

REDEVELOPMENT. See **Constitutional Law,** IV.

RELATION BACK OF AMENDED HABEAS PETITIONS. See **Habeas Corpus,** 2.

REMOVAL. See **Jurisdiction**, 2.

RESTRAINING ORDER ENFORCEMENT. See **Constitutional Law**, III, 3.

RETALIATION ACTIONS. See **False Claims Act.**

RIGHT TO COUNSEL. See **Constitutional Law**, VII.

SENTENCING. See **Constitutional Law**, VII.

SIXTH AMENDMENT. See **Constitutional Law**, VII.

SOVEREIGN IMMUNITY. See **Immunity from Suit.**

STATUTES OF LIMITATIONS. See **False Claims Act; Habeas Corpus**, 2, 4.

STAY OF MANDATE. See **Courts of Appeals.**

SUBMERGED LAND OWNERSHIP. See **Federal-State Relations.**

SUCCESSIVE HABEAS PETITIONS. See **Habeas Corpus**, 3.

SUPERMAX PRISON. See **Constitutional Law**, III, 2.

SUPPLEMENTAL JURISDICTION. See **Jurisdiction**, 1.

SUPREME COURT. See also **Courts of Appeals.**

1. Death of CHIEF JUSTICE REHNQUIST, p. XI.
2. Appointment of CHIEF JUSTICE ROBERTS, p. VII.
3. Term statistics, p. 1166.

TAKING OF PROPERTY. See **Constitutional Law**, IV; **Full Faith and Credit Statute.**

TAXES. See **Jurisdiction**, 2.

TEN COMMANDMENTS. See **Constitutional Law**, VI.

TEXAS. See **Constitutional Law**, V, 2; VI, 2.

THIRD-PARTY INFRINGEMENT. See **Copyrights.**

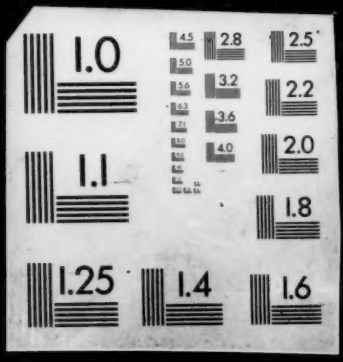
TRUCKING FEES. See **Constitutional Law**, II.

WAIVER OF IMMUNITY. See **Immunity from Suit.**

WATER PURCHASES. See **Immunity from Suit.**

WORDS AND PHRASES.

"The date on which the right asserted was initially recognized by the Supreme Court." 28 U. S. C. § 2255, ¶ 6(3). Dodd v. United States, p. 353.


1.0
1.1
1.25
1.4
1.6
2.8
3.2
3.6
4.0
2.5
2.2
2.0
1.8